

Issue: Group II Written Notice (unsatisfactory performance and failure to follow policy);
Hearing Date: 11/18/14; Decision Issued: 12/04/14; Agency: Virginia Tech; AHO:
Lorin A. Costanzo, Esq.; Case No. 10487; Outcome: No Relief – Agency Upheld.

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

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10487

Hearing Date: November 18, 2014
Decision Issued: December 4, 2014

PROCEDURAL HISTORY

On March 3, 2014, Grievant was issued a Group II Written Notice for *unsatisfactory performance* (Written Notice Offense Code "11") and *failure to follow instructions and/or policy* (Written Notice Offense Code "13"). The Written Notice provided under, "Nature of Offense and Evidence":

Failure to Follow Instructions and/or Policy, Unsatisfactory Performance. You are a Coordinator of Administrative Operations at **[Agency]**. In this position you are responsible for assuring adherence to University requirements for sound business practices and internal control procedures in the **[Office]**, which includes updating key and fixed assets inventories to ensure proper control. On February 24, 2014, you notified me and **[name]** that you had lost your key **[#]** at around Christmas time – two months ago. The **[Agency's]** Key Control Policy 5620 states all members of the **[Agency]** community are responsible for keys assigned to them; lost keys must be reported immediately. The two month delay in reporting this lost keys left the **[Office]** vulnerable to intrusions and/or theft.¹

On March 26, 2014, Grievant timely filed a grievance to challenge the Agency's action. When outcome of the Third Resolution Step was not satisfactory Grievant requested a hearing and her request for hearing was qualified on 9/18/14.² Effective October 27, 2014 the Office of Employment Dispute Resolution, Virginia Department of Human Resource Management, assigned this employee grievance to the undersigned Hearing Officer.

A pre-hearing telephone conference was held on 10/27/14 and the Grievance Hearing was held, with Grievant present, on November 18, 2014 at Facility.

APPEARANCES

Agency Presenter
Agency Party Representative (who was also a witness)
Grievant (who was also a witness)

ISSUES

Whether the issuance of a Group II Written Notice to Grievant was warranted and appropriate under the circumstances?

¹ A. Tab 1, pg. 4.

² A. Tab 1, pg. 1-3.

BURDEN OF PROOF

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

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

FINDINGS OF FACT

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

Grievant is an employee of Agency and has been with Agency for approximately 20 years.⁵ Grievant's job title is Coordinator Administrative Operations (CAO) and she is the *Key Control Designate* for Office. Grievant's job responsibilities include, among other matters, being responsible for maintaining and updating key and fixed assets inventories for Office to ensure proper control. She is charged with ensuring timely and accurate reports to keep management informed.⁶

All Agency departments, including Office, are required to maintain a complete and accurate understanding of the location of all keys. Within Agency the Department Coordinator of Administrative Operations is designated to be the "Key Control Designate".⁷

Grievant had been issued a key to Office by Agency. Grievant subsequently lost that key in or about November, 2013.⁸ Grievant did not report to Agency she had lost the key until February, 24, 2014 when she sent an e-mail stating, "I am writing to report that I recently lost a key to our office...".⁹ The initial e-mail she sent indicated she had "recently" lost her key. In response to an e-mail later that day to Grievant asking her when she lost the key, Grievant responded on 2/24/14 "... it was lost a little before Christmas".¹⁰ In an e-mail of 6/2/14 Grievant also stated, "I lost my office key in November and did not report it until February."¹¹

APPLICABLE LAW AND CONCLUSIONS:

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

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

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

⁵ G. Ex. 3A pg. 2.

⁶ A. Tab 10 pg. 5.

⁷ A. Tab 9 pg. 6.

⁸ A. Tab 4, pg. 16-18.

⁹ A. Tab 4 pg. 17 and A. Tab 1, pg. 13-14.

¹⁰ A. Tab 1, pg. 13-14.

¹¹ A. Tab 4, pg. 16-18.

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

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.¹² The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination.

DHRM Policy 1.60 further provides that for a first offense of a Group II level offense, in addition issuing the Group II Written Notice, the agency has the option of suspending the employee without pay for up to ten workdays.¹³

Failure to follow supervisor's instructions or comply with written policy is listed as an example of a Group II offense in Attachment A. of Policy 1.60. *Unsatisfactory work performance* is indicated as an Example of a Group I Offense in Attachment A. The *Standards of Conduct* provide that the examples of offenses set forth therein are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Section B. 2. of Policy No. 1.60, "*Standards of Conduct*" provides:

*Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense **not specifically enumerated**, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.¹⁴

Policy and Procedures No. 5620:¹⁵

¹² A. Tab 14.

¹³ A. Tab 14, Policy 1.60, Attachment A.

¹⁴ Agency Tab 14, Policy No. 1.60 "Standards of Conduct".

¹⁵ A. Tab 12 pg. 1-5.

Agency has promulgated Policy and Procedures Number 5620 regarding access control of buildings and properties owned and operated by Agency. This policy serves as a framework by which keys to Agency buildings are issued, monitored, and maintained. This policy applies to any individual who is granted authorized access to any Agency property and to all keys and devices that control access to Agency property. Policy 5620 provides, in pertinent part:

2.1 University Guidelines

2. All keys remain the property of **[Agency]**. Keys that are no longer needed shall be promptly returned to the departmental Key Control Designate or the Key Control Office.
3. All members of the university community are responsible for the keys assigned to them.
4. Lost keys must be reported immediately to the appropriate Department Head and to the Key Control Office.
5. Stolen keys must be reported immediately to the appropriate Department Head, the Key Control Office, and to the **[Agency]** Police Department.¹⁶

2.2 Departmental Responsibility

2. Each department shall establish and implement a key control record-keeping system that will ensure accountability for all departmental keys. All records will be considered high security and confidential and shall be kept current at all time. ...

Key Inventory procedures of Agency provide:¹⁷

Purpose:

All departments are expected to maintain a complete and accurate understanding of the location of all keys. The Department Coordinator of Administrative Operations (CAO) will serve as the Key Control Designate and will complete an annual inventory of departmental keys with independent review and convey the results to

Frequency: Annual – February or as staff changes or locks are changed

File locations

Paper:

Department Files (purple files in CAO's desk file drawer)/Key Inventory

Procedure

1. Tracking and Reconciliation of Keys

A. University door keys

- Track key inventory...Track other changes to the key inventory (request for additional keys, lost or stolen or broken)

Agency's Anti-Discrimination and Harassment Prevention Policy, *Policy 1025*, prohibits discrimination or harassment on the basis of race, sex, disability, age, veteran status, national origin, religion, political affiliation, or sexual orientation.¹⁸

¹⁶ A. Tab 12.

¹⁷ A. Tab 9, pg. 6.

¹⁸ A. Tab 13.

Grievant was issued a Group II Written Notice for failure to follow instructions and/or Policy *and* for unsatisfactory performance. The Written Notice indicates Grievant position of Coordinator of Administrative Operations (CAO) and her responsibility, in this position, for assuring adherence to Agency requirements for sound business practices and internal control procedures. Also, the Written Notice indicates her responsibility for updating key and fixed assets inventories to ensure proper control and that she delayed reporting she lost her Office key for approximately a 2 month period.

As CAO Grievant was required to be the Key Control Designate. Each Agency department, including Office, is charged with establishing and implementing a key control record-keeping system that ensures accountability for all department keys. The records are considered high security and confidential and are required to be kept current at all times.¹⁹

Grievant, as an Agency employee, is responsible for any key issued to her and is required by Policy to immediately report if her key is lost or stolen. Additionally, as the Office Key Control Designee and Coordinator Administrative Operations, Grievant has specific duties and responsibilities for updating key inventories and fixed assets inventories to ensuring proper control.²⁰

Grievant does not contest she was issued a key to Office by Agency, she lost the key , and did not report the key as being lost for at least a two month period after it was lost. Grievant does not contest she was the Office Key Control Designee and Coordinator Administrative Operations.

Grievant knew or should have known her responsibility to report immediately lost keys. Her job as Key Control Designee and CAO gave her additionally responsibilities for reporting her key loss in a timely manner and keeping inventories and other control documents related to keys and other fixed assets up to date. She was charged with ensuring timely and accurate reports to keep management informed.

Grievant contends unequal/unfair or misapplication of policy in that other employees have lost keys, not reported it immediately, and no formal disciplinary action was taken against them. Grievant also raises she was subject to retaliation, bullying, discrimination and/or harassment.

Unequal, unfair or misapplication of policy:

Grievant contends she was treated unfairly and differently than other employees who have lost keys and did not immediately report the loss. She contends, as she was disciplined and other employees were not disciplined for the same or similar matter, she was unfairly treated and subjected to an unequal or misapplication of policy by management. Grievant also contends a former named employee of Office, who *had been* the Office Key Control Designee/key coordinator prior to losing her key, lost a key, did not immediately report the lost key, and was not disciplined/written up.²¹

To find misapplication or unequal/unfair application of policy it is necessary to determine whether management violated a mandatory provision of policy, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

¹⁹ A. Tab 9, pg. 6. and A. Tab 12, pg. 1-5.

²⁰ A. Tab 10, pg. 5. and A. Tab 12.

²¹ A. Tab 1, pg. 1.

The evidence does not indicate similar facts and circumstances exist between Grievant and the other employees addressed by Grievant. Grievant's job duties included being both a Key Control Designee and a Coordinator of Administrative Operations when her key was lost, while it was lost and not reported, and when ultimately she reported it as being lost. Grievant's job duties charged her with responsibility for maintaining the key inventories and the fixed assets inventories. Grievant's job duties charged her with assuring adherence to internal control procedures in Office to insure proper control.²² She was one of the persons Office employees were charged with immediately notifying if they lost any key or had a key stolen. She was responsible for accounting for keys.²³ As Key Control Designee and Coordinator of Administrative Operations she was charged with not only being familiar with policies but following those policies. No evidence was offered that any other employee was, at the time of losing their key and until reporting the key lost, was also a COA and a Key Control Designee.

Grievant had at least a two month period between losing the key and her reporting the lost key. She reported on 2/24/14 that her key was known to be lost just before Christmas and later stated in writing she lost her key in November of 2013. No evidence was presented as to the actual time period between losing and reporting the key lost by any other employee. There is no evidence to determine if this time period was hours, days, weeks, or months.

Grievant indicated she specifically intended to withhold information about losing her key until the February key inventory or until she left for a new job, whichever occurred first. The evidence indicates Grievant made a conscious decision to delay reporting her lost key. Grievant expressed a specific intent and decision to not immediately report the lost key and to intentionally delay reporting her lost key including:

- I planned to report the key loss when I turned in my laptop and other keys before going to a new job.²⁴
- ... and since I'd had some very good job interviews, I felt I would have a new job well before the February key inventory took place.²⁵

Grievant decided, after losing her key, not to report the lost key until leaving her job or until the February key inventory. No evidence was introduced indicating an intent to delay reporting their lost key by any other employee.

There is insufficient evidence to find Grievant's circumstances were the same or similar to the other employees raised by Grievant as not being disciplined for not immediately reporting lost keys and who were presented by Grievant to show unfair/unequal/misapplication of policy. In contrast to Grievant, no evidence was admitted as to any other employee to find:

- an intentional plan being pursued by other employees in delaying/not reporting their key as lost,
- why any other employee did not immediately report their key as lost,
- how long it took other employees to report their key as lost,
- any other employee was a Key Control Designee and CAO when the key was lost and until it was reported.

²² A. Tab 9, pg. 3 and A. Tab 10 pg. 4.

²³ A. Tab 11.

²⁴ A. Tab 4, pg.18.

²⁵ A. Tab 4, pg.18.

For the reasons stated above, there is insufficient evidence to find Grievant was treated differently than other employees in the same or similar circumstances were treated and there is insufficient evidence to find unfair, unequal, or misapplication of policy.

Grievant:

Grievant contends the Group II Written Notice is unwarranted and extremely severe. She also contends she has been she has been subjected to bullying, harassment, discrimination, and/or retaliation which, among other matters, affected her decision to not immediately report the lost key and influenced Agency's decision to issue the Group II Written Notice.

Grievant stated she thought the key was lost on the other side of campus, not near where Office is located, and there was nothing on the key to indicate it came from Hall/Office. She contends there is an extremely low risk associated with her lost key and pointed out that the Office has not been re-keyed. Even given this, Policy requires immediate reporting of lost keys or stolen keys and does not make exception for a low risk of intrusion, theft, or if the key was lost far from where it could be used.

Discrimination is defined in §9 of the *Grievance Procedure Manual* as "Different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex.

Retaliation is defined in §9 of the *Grievance Procedure Manual* as "Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in §4.1(b). §4.1(b) of the *Grievance Procedure Manual* addresses the following matters:

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

Grievant contends being placed on administrative leave in April 2013 is evidence of bullying, harassment, discrimination, and/or retaliation. In April of 2013 Grievant was placed on administrative leave with pay for two weeks following a statement she made at work in a conversation with another employee. During that conversation Grievant stated, "If I wasn't a Christian, I would have killed **[name]** by now."

Grievant contends she was joking, the employee knew she was joking, and the employee even laughed at the statement. However, the employee addressed the matter to management. Management placed Grievant on administrative leave with pay and she was the subject of a mandatory referral to the Employee Assistance Program. She was required to participate in a minimum of one counseling session, and required to follow the recommendations made by the counselor.²⁶

²⁶ G. Ex. 2A, 2B, 2C.

Grievant appears to be contending this incident evidences management's subjecting her to bullying, harassment, discrimination, and/or retaliation. However, Grievant does not contest she made the above described statement about a fellow employee in a conversation with another employee in the workplace and the employee she made the statement to reported it. Concern is expressed as to the statement itself being made, especially in the workplace.

Grievant contends being the target of bullying contributed to withholding/delay in reporting her lost key. In Grievant's letter of 9/10/14 to President she stated she had been the target of workplace bullying in Office for the past three years.²⁷ Grievant also stated, in this letter:

When I questioned the severity of the punishment, I was told it was due to my *intentionally* withholding information about the loss, and as a key coordinator, I should have been familiar with the key-control policy which states that a key loss should be reported immediately. I agree that I should have acted more promptly, but feel that the punishment I received for the delay is extremely severe and unwarranted especially given the circumstances described below.

Under normal circumstances, under any other management I have had at **[Agency]**, I would not have hesitated to report the key loss. However, the situation in the [Office] is very different than in other offices. I have been the target of workplace bullying in this office for the past three years, and did not want to endure the condescending, disrespectful, verbal abuse that I expected to receive when reporting the key loss.

I felt sure I would be able to find the key, but to make a long story short, I spent a lot more time than anticipated looking for it and still wasn't able to locate it. Then because so much time had elapsed, I was afraid to report it at that point. I had allowed the bullying that I'd received since coming to this office to cloud my judgment, and as a result, I delayed telling management about the key loss until I did the key inventory"

Grievant, on 2/24/14, reported initially she *recently* lost her key and later that day, when asked the date the key was lost, reported she lost her key just before Christmas. Subsequently, in her e-mail of 6/2/14 Grievant stated she lost her key in November and confirmed not reporting it until February. In the 6/2/14 e-mail Grievant provided certain reasons for an intentional delay in reporting the loss of the key. She stated:

Initially, it was not my intention to wait so long before reporting the key loss. Since the key had a very distinct key chain, I felt there was a good chance that I would locate it. And since I'd had some very good job interviews, I felt I would have a new job well before the February key inventory took place. I planned to report the key loss when I turned in my laptop and other keys before going to a new job.²⁸

On 4-17-13 Grievant filed a grievance alleging pay discrimination on basis of gender.²⁹ The Grievance was referred to CCR for review and the determination on this matter was made not in Grievant's favor.³⁰

On April 15, 2014 Grievant filed an *Employee Complaint Form – Discrimination*³¹ indicating, under "Basis of Discrimination or Harassment Complaint" *Retaliation*. Grievant's Attachment raised a number of concerns, including, but not limited to:

²⁷ A. Tab 6, pg. 1.

²⁸ A. Tab 4, pg. 18.

²⁹ A. Tab 4, pg. 2.

³⁰ A. Tab 4, pg. 2 and 5.

³¹ G. Ex.3.0.

- In April of 2013 Grievant filed a grievance for discrimination which addressed being denied opportunity to attend a conference.
- In May of 2013 Grievant felt information was withheld intentionally so she would not be successful in conducting a training meeting. Grievant also noted she was able to successfully conduct the hour-long training session.
- Grievant felt the overall rating of “developing performance” given her in her 2013 evaluation was unwarranted and a result of the grievance she filled in April 2013. She noted in September 2013 she submitted an annual self-evaluation. She felt she had some very notable accomplishments but management barely mentioned a couple of these items in her evaluation.
- In October 2013 another direct supervisor was placed over her.
- In March 2014 the Group II Written Notice was issued.

On 7/30/14 HR addressed in its letter to Grievant the matter of the alleged discrimination or retaliation by Supervisor that Grievant raised in her 3/26/14 grievance. HR stated the grievance was to be handled at the second step as Grievant alleged discrimination or retaliation by her immediate supervisor. HR also stated, “This specific claim has been investigated by the Office of Compliance and Conflict Resolution. On July 27, 2014 that office concluded there was no evidence of a Policy 1025 violation.”³²

On review of the evidence admitted in this case, there is insufficient evidence to find, as contended by Grievant, bullying, harassment, or discrimination or that bullying, harassment, or discrimination influenced or affected the issuance of the Group II Written Notice to Grievant.

Retaliation:

Retaliation is defined in §9 of the *Grievance Procedure Manual* as "Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in §4.1(b). §4.1(b) of the *Grievance Procedure Manual* addresses the following matters:

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

To establish retaliation Grievant must show (1.) she engaged in a protected activity; (2.) she suffered an adverse employment action; and (3.) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.³³ Evidence establishing a causal

³² A. Tab 4, pg. 1.

³³ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.³⁴

While evidence indicates Grievant engaged in a protected activity, there is insufficient evidence to find a nexus or causal link existing between the protected activity and the adverse employment action. Additionally, Agency has presented a legitimate non-retaliatory business reason for the adverse action and there is insufficient evidence to find that Agency's stated business reason was a mere pretext or excuse for retaliation.

Upon consideration of all the evidence presented in this cause, there insufficient evidence to indicate the Group II Written Notice was a mere pretext or excuse for retaliation. For the reasons stated herein, Retaliation is not found in this cause.

Upon consideration of all the evidence in this cause, there is insufficient evidence to find, as Grievant contends, that issuance of the Group II Written Notice was due or related to her being subjected to bullying, harassment, discrimination, and/or retaliation.

Mitigation:

Va. Code § 2.2-3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".³⁵ The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.³⁶

The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a "super-personnel officer" and, 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. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness and, if the hearing officer mitigates the Agency's discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.³⁷

The evidence indicates that Agency gave consideration to mitigating and to aggravating circumstances. Grievant received one Group II Written Notice for both failure to follow instructions and/or policy and for unsatisfactory performance. For a first offense of a Group II offense, in addition issuing the Group II Written Notice, Agency had the option of suspending the employee without pay for up to ten workdays. While Agency did issue the Group II there was no suspension without pay.³⁸

Based upon review of all the evidence in this cause, the Hearing Officer finds the issuance of a Group II Written Notice does not exceed the limits of reasonableness.

³⁴ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

³⁵ Va. Code § 2.2-3005.

³⁶ Va. Code § 2.2-3005 (C)(6).

³⁷ *Rules for Conducting Grievance Hearings*, § VI. (B.)(2.).

³⁸ A. Tab 1, pg. 4 and A. Tab14, Policy 1.60, Attachment A.

CONCLUSION

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

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

Furthermore, Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group II Written Notice was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness.

DECISION

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

APPEAL RIGHTS

As the Grievance Procedure Manual and Rules for Conducting Grievance Hearings set forth in more detail, this hearing decision is subject to administrative and judicial review. Requests for review may be initiated by electronic means such as facsimile or e-mail. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

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

3. A challenge that the hearing decision does not comply with grievance procedure and/or the *Rules for Conducting Grievances Hearings* as well as a request to present newly discovered evidence is made to the Office of Employment Dispute Resolution. This request must refer to the specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent

to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed, or e-mailed.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. "Received by" means delivered to, not merely postmarked or placed in the hands of a delivery service. (Note: the 15 calendar-day period begins with the date of issuance of the decision, not receipt of the decision.) However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision.) A copy of each challenge or appeal must be provided to the other party.

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

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

Judicial Review of Final Hearing Decision: §7.3(a) of the Grievance Procedure Manual provides ***within thirty days of the final hearing decision***, either party may seek review by the Circuit Court on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. §7.3(a) further provides neither the hearing officer nor the Department of Human Resource Management (or any employee thereof) shall be named as a party in such an appeal. A copy of your notice of appeal must be provided at the time of filing to the other party and to Employment Dispute Resolution. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

Copy of this decision has been e-mailed to:
Grievant
Agency Advocate at Hearing