

Issue: Group II Written Notice with Suspension (failure to follow policy/instruction);
Hearing Date: 08/27/12; Decision Issued: 09/12/12; Agency: DJJ; AHO: Lorin A.
Costanzo, Esq.; Case No. 9873; Outcome: No Relief – Agency Upheld;
**Administrative Review: EDR Ruling Request received 09/27/12; EDR Ruling No.
2013-3448 issued 10/31/12; Outcome: AHO's decision affirmed; Administrative
Review: DHRM Ruling Request received 09/27/12; DHRM letter issued 11/05/12
declining to review.**

**COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF JUVENILE JUSTICE**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 9873

**Hearing Date: August 27, 2012
Decision Issued: September 12, 2012**

PROCEDURAL HISTORY

Grievant was issued a Group II Written Notice with 5 day suspension on May 14, 2012 for failure to follow instructions and/or policy. On June 4, 2012 Grievant timely filed a grievance to challenge the Agency's action. Matters proceeded through the resolution steps and, when matters were not resolved to his satisfaction, Grievant requested a hearing. The undersigned was appointed hearing officer on August 13, 2012. Hearing was held August 27, 2012 at Agency's location.

APPEARANCES

Grievant, who was also a witness
Agency Presenters
Agency Party Designee, who was also a witness
Additional witnesses:
 Counselor # 1
 Counselor # 2
 Prior Director

ISSUES

Whether the issuance of a Group II Written Notice with 5 day suspension was 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 action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.¹

FINDINGS OF FACT

¹ Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

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

01. Grievant has been employed by Agency since 1993. Grievant is currently a Rehabilitation Counselor Supervisor and has been such since December of 2010. Grievant has direct supervisory responsibility for four Rehabilitation Counselors at Facility.²

02. From approximately late September/early October of 2011 to on or about January 18, 2012, the effective date of a new Facility Director, Grievant was also the Acting/Interim Director of Facility.³

03. On May 14, 2012 Grievant was issued a Group II Written Notice with 5 workday suspension (i.e. from 5/15/12 through 5/21/12). The *Type of Offense* indicated the *Written Notice Offense Code* of "13" (Failure to follow instructions and/or policy). *Nature of Offense and Evidence* indicated:

[Grievant] didn't document monthly case file reviews for resident [name redacted] as required on his EWP and per [Facility] Policy & Procedure RR-1. On 6/13/11 he received an Interim Evaluation Form indicating that "reports and case Files are not kept up to date and are not always timely." He also allowed at least \$1900 to remain in the [Facility] Safe violating Policy and Procedure P-6 from documented dates 12/15/11 – 1/6/12.

04. Facility is one of two halfway houses/transitional residential programs operated by Agency. The age range of residents is generally 18 to 21 years of age. Facility provides direct care to residents placed there by the Courts to facilitate and support their placement back into the community. Facility has up to 10 residents.⁴

05. Resident was committed to Agency in November of 2011. He entered Facility from a Juvenile Correctional Center. In January of 2012 an incident occurred at Facility leading to Resident being charged with admitting an unauthorized guest. On January 10, 2011 Juvenile was discharged from the Facility, arrested, and detained.⁵

06. Resident received \$2600.00 while at Facility. Resident's \$2600.00 was placed in the Facility Safe on 12/15/11.⁶

07. *Facility Monthly Safe Access Log* records indicated that, via three withdrawals, a total sum of \$700.00 of Resident's \$2600.00 was withdrawn from the safe. *Facility Monthly Safe Access Log* for Facility Safe indicated the following activity concerning Resident's money:

12/15/11 ... Placing of funds in safe in amount of \$2600.00.
12/16/11 ... Resident withdrawal of funds in amount of \$2600.00.
12/16/11 ... Placing of funds in safe in amount of \$2600.00.
12/18/11 ... Resident withdrawal of funds in the amount of \$200.00
12/23/11 ... Resident withdrawal of funds in the amount of \$400.00

² Testimony.

³ Testimony and A. Ex. 12.

⁴ Testimony.

⁵ A. Ex. 11 and A. Ex. 12.

⁶ A. Ex. 12.

01/06/12 ... Resident withdrawal of funds in the amount of \$100.00 ⁷

08. Resident was released from custody the week of April 9, 2012. After being released, Resident contacted Facility requesting that his remaining \$1900.00 be returned to him. The \$1900.00 was not found to be in the Facility Safe.⁸

09. Agency initiated an investigation into the matter of the Resident's missing \$1900.00. A criminal investigation was also initiated into the matter.⁹

10. Grievant received a Counseling Note dated September 22, 2011 (signed by Grievant on 9/23/11). This counseling note provided, in pertinent part:

.... notes vital to the incident were not documented in the resident's case notes. The resident's case notes had been severely neglected. As the case manager/counselor's supervisor, it is your responsibility to ensure that the case files are kept up to date. This situation must not present itself again in the future. Thank you for your attention to this matter.¹⁰

11. Grievant's Employee Work Profile ("EWP"), Performance Evaluation (Date: 9/21/11) noted:

... Case reviews are not being held at least monthly and case files are not up-to-date. Resident reports are often late. [Grievant] has assumed on call and shift responsibilities as deemed necessary. Monthly reports have not been timely.¹¹

12. Grievant does not contest that he did not document in writing his conducting of monthly case file reviews.¹²

13. Grievant's Employee Work Profile ("EWP") (Date Written: 12/06/10) indicates, in pertinent part, the following as "Measures of Core Responsibilities":

- Assigns reviews and discusses resident cases with rehab counselors to ensure appropriate services are being provided per the treatment plan. The open and closed cases reviewed must contain accurate and timely documentation so that the compliance rate of the files remains at 100% standards and requirements of the Department.
- Conducts case file reviews including medical files and medication administration records at least monthly to ensure programmatic documentation is accurate.¹³

⁷ A. Ex. 8 and testimony.

⁸ A. Ex. 12 and testimony.

⁹ Testimony.

¹⁰ A. Ex. 3.

¹¹ A. Ex. 4.

¹² Testimony and A. Ex. 14.

¹³ A. Ex. 1; G. Ex. 1.

APPLICABLE LAW AND OPINION

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

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

DHRM Policy 1.60 - Standards of Conduct:

To establish procedures on the Standards of Conduct and Performance for employees of the Commonwealth and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management has promulgated Policy No. 1.60, *Standards of Conduct*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees 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.

“Failure to follow supervisor’s instructions or comply with written policy” is listed as an example of a Group II offense in *Attachment A* to Policy 1.60. *Attachment A* also provides that, for a first Group II Offense, in addition to the Group II Notice, the agency has the option of suspending the employee without pay for up to ten workdays.

This policy further provides that the examples of offenses set forth are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. The Standards of Conduct provides:

*Examples of offense, 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 this¹⁴

RR-1:

Procedure Number RR-1, Title: Management of Juvenile Records (Effective 07/15/09) provides, in pertinent part:

I. PURPOSE

To govern juvenile records management which includes the establishment, utilization, content, privacy, security, and preservation of records, as well as proper disposition of inactive records.

III. SCOPE

The procedure is applicable to all [Facility] staff.

V. PROCEDURES

A transfer file/record is maintained on each juvenile. ...

All transfer files will be reviewed monthly by the program supervisor. The assigned counselor will be informed, in writing, of any deficiencies. This written list must be returned in five (5) working days with a notation that all deficiencies have been corrected or with an explanation of the circumstances preventing immediate correction.¹⁵

P-6:

Procedure Number P-6, Title: Allowances, Effective 03/24/07 establishes procedures for Facility and provides:

V. PROCEDURES

Residents of [Facility] may have money derived from several sources Residents are encouraged to deposit money in a savings account at a local bank. Residents who secure and maintain employment are required to open a savings account and make regular deposits.

These accounts will be opened in the resident's name. Deposits and withdrawals will be monitored by the assigned counselor.

Small amounts of cash or checks belonging to residents may be temporarily stored in a locked safe located in the Secretary Senior's office. Each resident's funds are stored in a separate envelope containing an individual accounting record of funds located in the safe.¹⁶

Incidents:

¹⁴A. Ex. 13.

¹⁵A. Ex. 6.

¹⁶A. Ex. 7; G. Ex. 3.

In December of 2011, while at Facility, Resident had the sum \$2600.00 placed in Facility Safe by his Rehabilitation Counselor. Subsequently, \$700.00 of this sum was removed from safe.

In January of 2012 an incident occurred at Facility involving Resident. A female was discovered to have spent the night at Facility without knowledge or permission of Facility staff. This led to a Serious Incident Report ("S.I.R.") being filed, Resident being terminated from the Facility, and Resident being arrested. In April of 2012 the former resident requested the return of his moneys that his rehabilitation counselor had placed in the Facility Safe. The former resident's \$1900.00 was expected to be in Facility Safe but was found to be missing. A second "S.I.R." was initiated concerning this and eventually a criminal investigation was initiated.

In investigating and reviewing matters a number of Agency concerns arose, including management's concerns that Grievant was not following policy in documenting the monthly case file reviews and was not following policy concerning funds stored in Facility Safe.

After looking into matters brought to his attention, Regional Program Manager consulted with Grievance Coordinator. They discussed matters and discussed what would be an appropriate disciplinary action. Grievance Coordinator indicated to Regional Program Manager that a Group II would be appropriate. Regional Program Manager then directed Prior Director (who he supervised) to issue the Group II to Grievant. Prior Director was Grievant's supervisor.

Documentation:

Grievant does not contest allegations that he did not document monthly case file reviews. He testified he conducted monthly case file reviews but did not document in writing any deficiencies and did not document in writing that he conducted the reviews. Grievant testified that while he did not document any deficiencies in case file reviews, he would verbally contact the assigned counselor if there was a deficiency.

Grievant contends he was not required by policy or instruction to document the monthly case file reviews. Grievant indicated he did not receive case management training. He indicated only after the issuance of the Group II did he learn that there is a requirement to document in writing the monthly case file reviews. Grievant acknowledged that there is an Agency form for documentation of the monthly case file reviews being conducted but indicated he did not know of the form until after the Group II was issued.

Regional Program Manager testified that Grievant was a program supervisor. He believed that Grievant has received appropriate Agency training as to documentation. Regional Program Manager expressed strong concerns that documentation was a requirement of Grievant's position. He noted Grievant had training throughout his employment and participated in numerous Agency trainings as to documentation and need for documentation. Regional Program Manager testified he believed Grievant knew documentation was a requirement of his position and is required of those under his supervision as well.

Grievant indicated that the documentation was addressed and stressed in general at in-services. Grievant also indicated he has been employed in the past with Agency as a training officer.

Procedure RR-1 requires that all transfer files will be reviewed monthly by the program supervisor and that the assigned counselor will be informed, in writing, of any deficiencies. This policy further provided that this written list must be returned in five (5) working days with a notation that all deficiencies have been corrected or with an explanation of the circumstances preventing immediate correction.

The "Purpose" (Section I.) set forth within *Procedure RR-1* is to govern juvenile record management. This includes the establishment of records among the enumerated record matters set forth therein.

Grievant's Employee Work Profile (Date Written: 12/06/10) indicates, in pertinent part, the following as "Measures of Core Responsibilities":

- Assigns reviews and discusses resident cases with rehab counselors to ensure appropriate services are being provided per the treatment plan. **The open and closed cases reviewed must contain accurate and timely documentation so that the compliance rate of the files remains at 100% standards and requirements of the Department.** (emphasis added)
- **Conducts case file reviews** including medical files and medication administration records **at least monthly to ensure programmatic documentation is accurate.** (emphasis added)¹⁷

Grievant received an *Interim Evaluation Form* (Meeting Date: May 15, 2011) which indicated:

The supervision of the counselors continues to improve but reports are not always timely.

The level of involvement in ensuring the case files and medication records are maintained has also been improving. There appears to be a greater understanding of this aspect of his position after the monitoring visit, but reports and case files are not kept up to date and are not always timely.

[Grievant] needs to focus on the more supervisory aspects of his position rather than the activities he seems to enjoy the most.¹⁸

Grievant's *Counseling Note* dated September 22, 2011 indicated, in pertinent part:

.... It was noted that specific information of employment checks in the case notes vital to the incident were not documented in the resident's case notes. The resident's case notes had been severely neglected. As the case manager/counselor's supervisor, it is your responsibility to ensure that the case files are kept up to date. This situation must not present itself again in the future.¹⁹

Grievant's Employee Work Profile, Performance Evaluation (Date: 9/21/11) noted:

Treatment plans and services are not set in a timely manner. Cases are assigned in a disciplined manner. Case reviews are not being held at least monthly and case files are

¹⁷ A. Ex. 1; G. Ex. 1.

¹⁸ A. Ex. 2.

¹⁹ A. Ex. 3.

not up-to-date. Resident reports are often late. [Grievant] has assumed on call and shift responsibilities as deemed necessary. Monthly reports have not been timely²⁰

Grievant's EWP (date written: 12/06/10) specifically stated under "Measures for Core Responsibilities" requirements that the open and closed cases reviewed must contain accurate and timely documentation so that the compliance rate of the files remains at 100% standards and requirements of the Department. Grievant's EWP's "Measures for Core Responsibilities" also provides for Grievant to conduct case file reviews at least monthly to ensure programmatic document is accurate, complete. *Procedure RR-1* provides similar requirement that all transfer files be reviewed monthly by the Program Supervisor. Documentation of conducting the case file reviews at least monthly is part of the documentation required to insure the compliance rate of the files remains at 100%.

Grievant has been informed of the importance and need of documentation, received training on the importance and need of documentation, and documentation of compliance with standards and requirements of the Department is set forth as a "Measure of Core Responsibilities" in his EWP (date written: 12/06/10).

Grievant's EWP sets forth, and thus Grievant knew or should have known, that open and closed cases reviewed must contain accurate and timely documentation so that the compliance rate of the files remains at 100% standards and requirements of the Department. Conducting the monthly case file reviews is a "standard and requirement of the Department" set forth in both EWP and *Procedure RR-1*. As such, files are required to contain accurate and timely documentation that the monthly case reviews were conducted.

Grievant has stated that he did not document deficiencies determined in any case files reviewed but did orally discussed same with the rehab. counselor he supervised. *Procedure RR-1* requires notifications of deficiencies be in writing with a written notation as to the correction or circumstances preventing immediate correction. Written documentation is stressed. *Procedure RR-1* provides all transfer files will be reviewed monthly by the program supervisor and the assigned counselor will be informed, in writing, of any deficiencies. Furthermore, this written list must be returned in five (5) working days with a notation that all deficiencies have been corrected or with an explanation of the circumstances preventing immediate correction.²¹

The Interim Evaluation Form of 5/15/11 indicated Agency's concerns as to reports and case files not being kept up to date and timely. The 9/22/11 Counseling Note addressed concerns as to his responsibilities as a supervisor to keep case files up to date.²² The 9/21/11 EWP expressed concern that case reviews are not being held at least monthly and case files are not up-to date.²³

Grievant's EWP (date written 12/06/2010) indicates under *Part II - Work Description & Performance Plan* that the holder of the position should possess a knowledge of case management practices (see Section 18) and should possess progressively responsible experience in, among matters, case management (see Section 19). Agency has expressed its concerns for written documentation and has conducted training concerning report writing and documentation with Grievant.²⁴

²⁰ A. Ex. 4.

²¹ A. Ex. 6.

²² A. Ex. 3.

²³ A. Ex. 4.

²⁴ A. Ex. 9 and testimony.

The evidence indicates that Grievant knew, or should have known, that documentation of the monthly case file reviews he is charged with conducting is required. Agency has met its burden of proof, by a preponderance, that Grievant didn't document monthly case file reviews for Resident as required on his EWP and as per Facility *Procedure RR-1*.

Facility Safe:

Grievant is also charged with failure to follow instructions and/or policy in that he allowed at least \$1900.00 to remain in the Facility Safe in violation of Policy and Procedure P-6 from documented dates 12/15/11 – 1/6/12.

Grievant has been a Rehabilitation Counselor Supervisor at Facility since December of 2010. Additionally, Grievant was Facility's "Interim Director" from approximately late September 2011 until the new Director took over on or about January 18, 2012. Grievant was the Interim Director and Rehabilitation Counselor Supervisor when the following actions were documented:

12/15/11 ...	Placing of funds in safe in amount of \$2600.00.
12/16/11 ...	Resident's \$2600.00 was withdrawal from safe and returned to safe.
12/18/11 ...	\$200.00 of Resident's money was withdrawn from safe.
12/23/11 ...	\$400.00 of Resident's money was withdrawn from safe.
01/06/12 ...	\$100.00 of Resident's money was withdrawn from safe. ²⁵
01/10/12 ...	Resident was terminated and left Facility.

For the period of 12/15/11 to 1/06/12 Resident had an initial amount of \$2,600.00 placed in Facility Safe and a total of \$700.00 documented as being removed from Resident's \$2,600.00. The Facility Monthly Safe Access Log does not indicate any entries after 01/06/12 concerning Resident's moneys.

Matters concerning Grievant were brought to management's attention when two Serious Incident Reports ("S.I.R.") relating to two separate events were filed. The first "S.I.R." addressed a January 9, 2012 incident when a daily breakfast call was conducted and an adult female was found in Resident's room. It was determined Resident admitted an unauthorized guest into the Facility. This led to Resident being removed from the Facility on 1/10/12 when the Sheriff's Department arrested and detained him.

The second "S.I.R." addressed matters relating to the April 11, 2012 request made by the resident who was terminated from Facility on 1/10/12 (discussed above) that his money held by Agency be returned to him. The sum of \$1900.00 was believed to be remaining of the initial \$2600.00 placed in Facility Safe. Staff was not able to locate the \$1900.00 in the safe or anywhere else. Additionally, the individual's birth certificate and social security card were determined to be missing from the safe.

The second "S.I.R." indicated a Rehabilitation Counselor went to the bank and cashed a check for \$2600.00 that Resident had received and placed the Resident's \$2600.00, in cash, in the Facility Safe. Staff was reported as indicating, when asked why a savings account was not immediately opened, that

²⁵ A. Ex. 8 and testimony.

they needed Resident's Social Security card in order for him to get his ID at the DMV which was needed to open a bank account.

The "S.I.R." addressing the missing \$1900.00 led to both Agency's investigation of matters and a criminal investigation being conducted. During management's investigation and review certain matters were discovered that gave rise to concerns as to Grievant's actions.

The evidence indicates Resident received \$2600.00 which was placed in the Facility Safe by his Rehabilitation Counselor. Grievant testified he was aware that the \$2600.00 was placed in the Facility Safe and aware that the Resident's money was kept in the Facility Safe.

Procedure P-6 states that small amounts of cash or checks belonging to residents may be temporarily stored in a locked safe located in the Secretary Senior's office. Agency contends that Grievant violated *Procedure P-6* when he allowed at least \$1900.00 to remain in the Facility Safe from documented dates 12/15/11 until 1/6/12, the date of the last Monthly Safe Access Log entry. Agency contends *Procedure P-6* was violated in that the amount of Resident's money Grievant allowed to be placed in the safe was not a "small amount" and Resident's money was not "temporarily stored" in the safe. Grievant contends that, as there is no definition in *Procedure P-6* of what is considered a "small amount" and no definition of "temporary", he should not be held responsible for a violation of *Procedure P-6*.

Records indicate Resident's \$2600.00 was placed in the Facility Safe on 12/15/11 and a total of \$700.00 was withdrawn. The withdrawal of \$700.00 does not appear to be at issue. Thus, records indicate \$1900.00 remaining in the safe after the last withdrawal of funds recorded on 1/6/12.

Matters and circumstances related to the money, including the date(s) that the indicated remaining \$1900.00 was removed from the Safe, are under investigation and have not been determined. However, the *Monthly Safe Access Log* indicated and Agency believed the \$1900.00 to be in the Facility Safe until April of 2012. Only when the terminated resident requested his money be returned did Agency become aware his \$1900.00 was not in the Facility Safe as Agency believed.

Grievant contends both the initial \$2600.00 and the "at least \$1900.00" being stored in the safe were authorized under *Procedure P-6* as these were "small amounts". Grievant raises a 7/28/2011 *Monthly Safe Access Log* entry indicating a \$2832.00 check was stored in the safe as evidence of the propriety of allowing at least \$1900.00" to remain in the safe from documented dates 12/15/11 to 1/6/12 .

Certain *Monthly Safe Access Log* sheets bearing dates in July 2011 to April of 2012 were admitted and reviewed. Those log entries indicating a date of entry and an amount are summarized below (checks are listed as "ck" and money orders as "m.o."). The Resident's money transactions at issue in this case, and discussed above, are not included in the below summation.

*Summation of Facility Monthly Safe Access Log entries indicating
(cash transaction unless otherwise designated)*

2012

4/4	\$70	3/28	\$9.45	3/23	\$10
3/22	\$20	3/8	\$9.45 ck	2/21	\$240 in & \$240 out

2/19	\$12	2/9	\$12	2/7	\$20
1/20	\$19.95				

2011

12/27	\$19.95 and \$9.27 ck	12/16	\$56	12/3	\$80
12/1	\$100 m.o. and \$80	11/30	\$56 ck and \$100 m.o.	11/10	\$798.88 ck
11/8	\$60	11/7	\$61.12	11/4	\$20 and \$14
11/3	\$5	9/22	\$20 & \$280	9/20	\$10 ck
9/18	\$32	9/13	\$32	9/9	\$32
8/12	\$82.05 ck	8/1	\$10	7/28	\$2832 ck

Only one log entry indicated an amount being kept in the safe equal or greater than the “at least \$1900.00” of Resident’s funds allowed by Grievant to be kept in the Facility Safe. The safe log indicates that a check for \$2832.00 was placed in the safe on 7/28/11. This was a check. There is no evidence as to the length of time it was kept in the safe or as to circumstances surrounding its placement or retention in the safe. There is no evidence whether or not any disciplinary action was taken concerning this matter.

There is insufficient evidence to find that prior actions and safe utilizations indicate that allowing “at least 1900.00” to remain in the Facility Safe from 12/15/11 to 1/6/12 was consistent with and permissible under *Procedure P-6*. Under the facts in this case, *Procedure P-6* states specifically that “small amounts of cash or checks belonging to residents may be temporarily stored in locked safe ...” .

Procedure P-6 does not define “small amounts” therefore the commonly acceptable definition of “small amounts” would apply. The provisions of *Procedure P-6* and the fact the amount of cash moneys at issue is “at least \$1900.00” do not support Grievant’s contentions that this is a “small amount of cash”.

Procedure P-6 states Agency’s desire to encourage residents to deposit money in a savings account at a local bank and even requires residents who secure and maintain employment to open a savings account and make regular deposits. In *Procedure P-6* Agency expressed both its desire and the requirement to limit the money and checks stored in its safe to small amounts that would be temporarily stored. There appears to be a valid business purpose in limiting the exposure to possibility liability for sums stored.

The “at least \$1900.00” Grievant allowed to remain in the safe was cash that was allowed to remain in the safe from *at least* 12/15/11 to 1/6/12. The date the money was removed from the safe/Agency control is not known. There is evidence that the money was not determined to be missing from the Facility Safe until April, 2012 which is approximately 3 months after the last *Facility Monthly Safe Access Log* entry of 1/6/12 concerning the money. Furthermore, the money was not determined to be missing until approximately 3 months after 1/10/12, the date the individual left Facility and was terminated as a Facility resident.

The totality of the evidence does not support Grievant’s contentions that the “at least \$1900.00” was “small amount” or that the money was being temporarily stored. The totality of the evidence indicates that, given the particular facts and circumstances of this case, this was neither a “small amount” nor was it “temporarily stored”. Grievant knew or should have known that *Procedure P-6* requirements would be violated by allowing “at least 1900.00” in cash to be kept in the Facility Safe from documented dates 2/15/11 to 1/6/12.

Agency has met its burden as to the allegation of Grievant failure to follow instructions and/or policy in allowing at least \$1900.00 to remain in the [Facility] Safe violating Policy and Procedure P-6 from documented dates 12/15/11 – 1/6/12.

Mitigation:

Va. Code § 2.2 – 3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the department of employment dispute resolution..."²⁶.

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

The Hearing Officer does not find the Agency's discipline exceeds the limits of reasonableness.

CONCLUSION

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

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

DECISION

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group II Written Notice with 5 workday suspension was warranted and appropriate under the circumstances and the Agency's issuance of a Group II Written Notice with 5 workday suspension is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

²⁶ Va. Code § 3005.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

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

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

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

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

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

November 5, 2012

RE: **Grievance of [Grievant] v Department of Juvenile Justice**
Case No. 9873

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following applies:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with either state human resource management policy or agency human resource management policy, you may request the Director of the Department of Human Resource Management (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of the OEDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

Concerning item number 2 above (policy issues), in each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource management policy, either state or agency, the hearing decision is inconsistent. While you state that the hearing officer's decision is inconsistent with DJJ's Abraxus House Policy & Procedure RR-1 and Safe Policy & Procedure P-6, the hearing officer determined that, based on the summary evidence, your actions clearly were in violation of those policies. Your appeal to DHRM failed to demonstrate how the hearing officer was incorrect in his interpretation or application of policy in making his decision. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We therefore will not disturb this decision.

Sincerely,

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services