

# Standards of Conduct

Policy: 1.60

Effective Date: April 16, 2008

Revised: 6/1/11

## STANDARDS OF CONDUCT

*Application: All positions covered by the Virginia Personnel Act, including non-probationary full-time and part-time classified and restricted employees. Agencies may use this policy as a guide for evaluating the workplace conduct of employees who are not covered by the Virginia Personnel Act, such as wage employees, probationary employees and employees expressly excluded from the Act's coverage. (Official Written Notice forms may not be issued to these employees.)*

### **POLICY**

It is the policy of the Commonwealth to promote the well-being of its employees by maintaining high standards of work performance and professional conduct.

### **PURPOSE**

The purpose of this policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness.

It is the intent of this policy that agencies follow a course of progressive discipline that fairly and consistently addresses employee behavior, conduct, or performance that is incompatible with the state's Standards of Conduct for employees and/or related agency policies. Disciplinary actions must be founded on the principles of due process and will employ a range of corrective and disciplinary actions that are applied based on the nature and history of the misconduct or unacceptable performance. Corrective and disciplinary actions must be administered through a prompt and fair process as described in this policy's Administrative Procedures. The ultimate goal of this policy and its procedures is to help employees become fully contributing members of the organization. Conversely, this policy is also designed to enable agencies to fairly and effectively discipline and/or terminate employees whose conduct and/or performance does not improve or where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.

The Administrative Procedures for the consistent administration of this policy are attached.

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## **EMPLOYEE STANDARDS OF CONDUCT**

Employees covered by this policy are employed to fulfill certain duties and expectations that support the mission and values of their agencies and are expected to conduct themselves in a manner deserving of public trust. The following list is not all-inclusive but is intended to illustrate the minimum expectations for acceptable workplace conduct and performance.

*Agencies have the authority to supplement this list as needed in a manner consistent with the needs of the organization and intent of this policy.*

Employees who contribute to the success of an agency's mission:

- Report to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.
- Perform assigned duties and responsibilities with the highest degree of public trust.
- Devote full effort to job responsibilities during work hours.
- Maintain the qualifications, certification, licensure, and/or training requirements identified for their positions.
- Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.
- Use state equipment, time, and resources judiciously and as authorized.
- Support efforts that ensure a safe and healthy work environment.
- Utilize leave and related employee benefits in the manner for which they were intended.
- Resolve work-related issues and disputes in a professional manner and through established business processes.
- Meet or exceed established job performance expectations.
- Make work-related decisions and/or take actions that are in the best interest of the agency.

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- Comply with the letter and spirit of all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations.
- Report circumstances or concerns that may affect satisfactory work performance to management, including any inappropriate (fraudulent, illegal, unethical) activities of other employees.
- Obtain approval from supervisor prior to accepting outside employment.
- Obtain approval from supervisor prior to working overtime, if non-exempt from the Fair Labor Standards Act (FLSA).
- Work cooperatively to achieve work unit and agency goals and objectives.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

**Note:** *Non-probationary law enforcement officers employed by the Department of State Police, the Virginia Marine Resources Commission, the Department of Game and Inland Fisheries, the Department of Alcoholic Beverage Control, the Department of Conservation and Recreation, the Department of Motor Vehicle, and the campus police department of any public institution of higher education of the Commonwealth where such department, bureau or force has ten or more law-enforcement officers (policy corrected 1/10/12) also have access to the procedural guidelines of Va. Code § 9.1-500 – 507 in cases of investigation of work-related matters that could lead to the dismissal, demotion, suspension or transfer for punitive reasons of a law-enforcement officer. (This Code section also applies to certain non-covered employees who are law enforcement officers employed by the Division of Capitol Police and the Virginia Port Authority.)*

### AUTHORITY

The Director of the Department of Human Resource Management (DHRM) is responsible for the official interpretation of this policy pursuant to the authority provided § 2.2-1201 of the Code of Virginia. DHRM reserves the right to revise or eliminate this policy as necessary.

The Virginia Personnel Act, Code of Virginia § 2.2-2900 *et. seq.* specifies that agency heads shall be the appointing authorities of their respective agencies and shall establish methods of personnel administration within their agencies.

Agencies may supplement this policy to accommodate specific business needs.

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Supplemental policies must be consistent with the provisions of DHRM policy and must be communicated to all agency employees.

### **RELATED POLICIES**

- 1.05 Alcohol and Other Drugs
- 1.25 Hours of Work
- 1.35 Emergency Closings
- 1.40 Performance Planning and Evaluation
- 1.70 Termination from State Service
- 1.75 Use of Electronic Communications and Social Media
- 1.80 Workplace Violence
- 2.30 Workplace Harassment
- 4.30 Leave Policies - General Provisions

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## ADMINISTRATIVE PROCEDURES

### STANDARDS OF CONDUCT

#### Purpose

These procedures accompany the Standards of Conduct Policy 1.60 and are designed to assist agencies in the administration of the Commonwealth's disciplinary system.

#### **A. General Principles**

Corrective actions, whether informal or formal, must depend upon the nature, consequence(s), or potential consequence(s) of the employee's conduct or performance and the surrounding circumstances and mitigating factors, if any. Management should apply corrective actions consistently, while taking into consideration the specific circumstances of each individual case. Prior to taking any corrective action it is suggested that management consider the following:

- Whether the corrective action is consistent with state and agency standards of conduct.
- The nature, severity, and consequences of the offense.
- Whether the offense constitutes a violation of a policy, procedure, rule, or law.
- Previous counseling, whether informal or formal that addressed the same or similar misconduct or performance.
- Previous disciplinary actions that addressed the same or similar misconduct or performance.
- Whether the offense relates to the employee's job duties and the employee's ability to perform satisfactorily.
- How issues with similarly situated employees have been addressed.
- Mitigating factors that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity.
- If the corrective action is appropriate for a specific offense.

Before the need for, or in addition to corrective action, supervisors may refer

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employees to the *Employee Assistance Program (EAP)* or other professional assistance program (for employees who do not participate in the state's healthcare plan) as appropriate. Referral to the EAP or comparable program shall not be considered a substitute for any disciplinary action imposed for the commission of an offense.

**Note:** Referral to the EAP or comparable program *may be required* depending upon the nature of the behavior or misconduct. Agencies are advised to consult with their Assistant Attorney General prior to mandating participation.

## **B. Corrective and Disciplinary Actions**

The Commonwealth's disciplinary system typically involves the use of increasingly significant measures to provide feedback to employees so that they may correct conduct or performance problems. It is designed to encourage employees to become fully contributing members of the organization and to enable agencies to fairly, and with reliable documentation, terminate employees who are unable or unwilling to improve their conduct and/or job performance.

### **I. Counseling**

Counseling is *typically* the first level of corrective action but is not a required precursor to the issuance of Written Notices. Counseling may be an informal (verbal) or formal (written) communication which conveys that an employee's conduct or performance was improper and must be corrected. This level of corrective action would be appropriate for conduct and/or performance issues resulting in minimal impact to business operations, to the safety and well-being of others, or that involve minor infractions of policies or laws.

Counseling may be documented by a letter or memorandum, but not on the Written Notice form. Documentation regarding counseling should be retained in the supervisor's files, and not in the employee's personnel file, except as necessary to support subsequent formal disciplinary action.

Employees are not permitted to have legal representation in counseling sessions.

#### **a. Informal (Verbal) Counseling**

Counseling should consist of private discussions between employees and their supervisors regarding the desired course of action to improve the employees' performance and/or conduct, the supervisors' expectations for improvement, and what may occur if the performance or conduct is not corrected. The supervisor should explain that a summary of the conversation will be notated and may be placed in the supervisory file(s).

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## b. **Formal (Written) Counseling**

A written memorandum should be issued to emphasize the significance of relatively minor acts of misconduct or unacceptable performance when facts and discussions with the employee demonstrate that verbal counseling has not corrected the problem. It may also be issued as the initial means to address first instances of misconduct or unsatisfactory performance.

Formal counseling must be documented by a letter or memorandum, but not on the Written Notice form. A copy of the letter or memorandum must be given to the employee. Counseling documentation should be retained in the supervisors' files, not in employees' personnel files, except as necessary to support subsequent formal disciplinary action.

When conducting a formal counseling session in which a written memorandum will be issued the supervisor should meet privately with the employee to discuss the conduct or performance issues and the desired course of action for improvement, including the supervisors' expectations and what may occur if the performance or conduct is not corrected.

## 2. **Written Notices**

When counseling has failed to correct misconduct or performance problems, or when an employee commits a more serious offense, management should address the matter by issuing a Written Notice. A Written Notice may be accompanied by additional actions including suspension; a demotion or transfer with reduced responsibilities with a disciplinary salary action; a transfer to an equivalent position in a different work area; or termination, as described in Sub-Sections a, b, and c. Management should issue Written Notices as soon as reasonably possible after becoming aware of misconduct or unacceptable performance. (Refer to Section E. "Due Process" for procedural guidance.)

The Written Notice Form must include an advisory statement that an active Written Notice may affect the employee's overall annual performance evaluation rating.

To assist management in the assessment of the appropriate corrective action, offenses are organized into three groups according to the severity of the misconduct or behavior.

*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*

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*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.

a. **Group I Offense**

Offenses in this category include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention.

- See attachment A for examples of Group I Offenses
- Active Life of Notice: Two years from its date of issuance to the employee.
- Suspension Options: No suspension for first offense, but a third active Group I Notice may result in a suspension of ten workdays (or a maximum of 80 hours for non-exempt employees). Refer to Section D. 1 for guidance on suspensions for exempt employees.
- Accumulation of four active Group I Offenses normally should result in termination unless there are mitigating circumstances.
- Absent mitigating circumstances, a repeat of the *same, active* Group I Offense should result in the issuance of a Group II Offense notice.

b. **Group II Offense:**

Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.

- See attachment A for examples of Group II Offenses.



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- Active Life of Notice: Three years from its date of issuance to the employee.
  - Suspension Options: Suspension of up to 10 workdays (or maximum of 80 hours for non-exempt employees) for the first Group II Offense. Refer to Section D. 1 for guidance on suspensions for exempt employees.
  - A second active Group II Notice normally should result in termination; however, when mitigating circumstances exist, an employee may be suspended for up to 30 workdays and/or demoted or transferred with reduced responsibilities and a disciplinary salary action; or transferred to an equivalent position in a different work area with no change in salary.
  - A Group II Notice in addition to three active Group I Notices normally should result in termination, but suspension and or a demotion or transfer with reduced responsibilities and a disciplinary salary action; or transfer to an equivalent position in a different work area with no change in salary may be considered.
- c. **Group III Offense:**  
Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.
- See attachment A for examples of Group III Offenses.
  - Active Life of Notice: Four years from its date of issuance to the employee.
  - Suspension Options: Suspension of up to 30 workdays (or maximum of 240 hours for non-exempt employees). Refer to Section D. 1 for guidance on suspensions for exempt employees.
  - One Group III Offense normally should result in termination unless there are mitigating circumstances.

**Note:** *The active life of Written Notices as stated above are definite and may not be extended due to an employee's absence. Notices expire when an employee voluntarily or involuntarily separates provided that re-employment with the same or different agency occurs after a formal break in service and a new probationary period is required.*

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## 3. Mitigating circumstances

- a. Agencies may reduce the level of a corrective action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance.
- b. Mitigating circumstances for a Group III offense may support, as an alternative to termination, an employee's demotion or transfer to a position with reduced responsibilities *and* a disciplinary salary action with a minimum 5% reduction in salary; transfer to an equivalent position in a different work area; and/or suspension of up to 30 workdays.
- c. An employee who is issued a Written Notice that would normally warrant termination but who is not terminated due to mitigating circumstances should be notified that any subsequent Written Notice for any level offense during the active life of the Written Notice may result in termination.

## C. Pre-disciplinary Leave with Pay

Pre-disciplinary Leave is *leave with pay* to be used when disciplinary action is being considered and the employee's removal from the workplace is necessary or prudent. There are two categories of Pre-Disciplinary Leave with Pay:

### 1. Immediate Removal from the Workplace for Disciplinary Reviews or Administrative Investigations

Management may immediately remove an employee from the workplace without providing advance notification when the employee's continued presence:

- may be harmful to the employee, other employees, clients, and/or patients;
  - makes it impossible for the agency to conduct business;
  - may hamper an internal agency investigation into the employee's alleged misconduct;
  - may hamper an investigation being conducted by law enforcement ; or
  - may constitute negligence in regard to the agency's duties to the public and/or other employees.
- a. An employee should be immediately advised of the reason for his/her removal from the workplace. As soon as possible after an employee's removal from the work area for reasons stated above, management must provide the employee with written notification of the intended corrective action and a summary or description of the evidence of the offense for which

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the corrective action is being contemplated, and when applicable, that an administrative investigation of the employee's conduct is underway. Employees must be provided a reasonable opportunity to respond before taking any formal corrective action.

- b. Employees may be placed on pre-disciplinary leave in order to conduct a disciplinary review or administrative investigation for up to fifteen workdays (maximum of 120 hours for non-exempt employees). If the disciplinary review or administrative investigation is not completed within fifteen workdays the agency must (1) impose disciplinary action in accordance with this policy; (2) permit the employee to return to work pending the outcome of the review or investigation; or (3) extend pre-disciplinary leave with pay for a specified period of time as determined by the agency head.
- c. Written notification of pre-disciplinary leave with pay pending a disciplinary review or agency administrative investigation should be by memorandum, not by the Written Notice form.

### **2. Removal from the Workplace for Alleged Criminal Conduct**

Management may also immediately remove an employee from the workplace without providing advance notification when he/she is under investigation for alleged criminal conduct that is related to the nature of his/her job or to the agency's mission. Management should consider the employee's ability to perform his/her assigned responsibilities and if the employee's continued presence:

- may constitute negligence in regard to the agency's duties to the public and/or other employees.
  - may be harmful to the employee, other employees, clients, students, or patients;
  - makes it impossible for the agency to conduct business;
  - may hamper the investigation by law enforcement.
- a. An employee who is placed on pre-disciplinary leave with pay because of alleged criminal conduct that impacts the employee's ability to do his/her job or represents a risk to the agency shall be continued on leave with pay until either (a) the employee is formally charged with a criminal offense by authorities or entities outside of the employer agency, such as by arrest or indictment, or (b) the criminal investigation is concluded without any formal charges being made.
  - b. Any employee who is formally charged with a criminal offense (that is related to the nature of his/her job or to the agency's mission) by outside authorities shall be immediately suspended without pay for a period not to

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exceed ninety (90) calendar days. (*Agencies have the option to allow employees to charge accrued annual, overtime, compensatory, or family personal leave to this period of suspension provided that the employee has sufficient leave balances.*)

- c. If, at the conclusion of the 90 day period there has been no resolution of the criminal charge, the employee will be placed on or returned to pre-disciplinary leave with pay until the charge has been resolved. If the criminal investigation is concluded without any formal charges being made, or if the charge is resolved without the employee being convicted of it, the employer shall return the employee to active status. Any accrued annual leave applied to the period of suspension without pay shall be reinstated.
- d. Regardless of the status of any criminal investigation or process, the agency may determine at any time to institute disciplinary charges against the employee under the Standards of Conduct, up to and including termination, based upon the facts or evidence of conduct that prompted the criminal investigation or process.

### **D. Disciplinary Suspensions**

All disciplinary suspensions are without pay. Employees on suspension normally shall not be allowed on the agency's premises, nor shall they be allowed to work except to fulfill previously scheduled court obligations or to file and process a grievance or Equal Employment complaint.

Suspensions resulting from a Written Notice, or an accumulation of Notices, and the maximum periods of suspension are described in Section B. 2, Formal Written Notices, and in Attachment A for each level of Written Notice.

#### **1. Suspension of Employees Exempt from the Fair Labor Standards Act**

Exempt employees' salaries may not be reduced as the result of a suspension except as described in this section. Exempt employees should be reimbursed promptly for any disciplinary salary reductions that are non-compliant.

- a. Disciplinary suspension of an exempt employee for an infraction of a safety rule of major significance may be applied for less than a full workday or workweek. Safety rules of major significance are defined as provisions intended to prevent serious danger to the workplace or to other employees, such as prohibiting smoking in explosives plants, oil refineries, and coal mines.

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- b. If an exempt employee is suspended for misconduct the suspension shall be not less than a full workday. Suspensions of more than one workday must be in multiples of full workdays, e.g., a three-day (24 hour) suspension for an employee assigned to 8-hour workdays, or a three-day (30 hour) suspension for an employee assigned to 10-hour workdays. If it becomes necessary to remove an exempt employee from the workplace for a partial workday due to the employee's misconduct, the employee must be paid for that partial day's absence.
- c. If an exempt employee is suspended for disciplinary reasons related to the employee's unsatisfactory attendance or performance issues (non-conduct related) the suspension shall be not less than a full workweek. Suspensions of more than one workweek will be in multiples of full workweeks, e.g., a three-week (120-hour) suspension. An employee may not be permitted to serve a suspension related to attendance or performance other than in whole workweek segments. Less serious violations in these areas should be addressed by other means of discipline, reserving suspension for the most serious or repeated violations.
- d. If an exempt employee is suspended pending the outcome of a criminal investigation, the employee must be paid for any partial workweek suspensions. Full workweeks of suspension are unpaid.

*Although probationary employees are not covered by this policy, the FLSA rules for suspension do apply.*

### **2. Pay and Benefits During Suspension**

The provisions regarding compensation and benefits set forth below apply to disciplinary suspensions without pay.

- a. Performance increases and annual leave accrual
  - Employees' eligibility for performance increases may be affected by the time on suspension in accordance with Policy 1.40, Performance Planning and Evaluation.
  - Suspensions exceeding 14 calendar days shall affect an employee's length of service for purposes of annual leave accrual.
- b. Annual and "traditional" sick leave accrual

An employee on suspension will not accrue annual or "traditional" sick leave, except that:

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- if a suspension extends into a second pay period, accrual of annual and sick leave shall resume in the second pay period unless the period of suspension exceeds 15 calendar days; and
  - if a suspension extends into a third pay period, accrual of annual and sick leave shall resume in the third pay period unless the period of suspension exceeds 31 calendar days, and so on.
- c. VSDP (Virginia Sickness and Disability Program) benefits
- Employees who are suspended may not access their VSDP benefits during the period of suspension.
  - Employees who are terminated for disciplinary reasons are not eligible to receive VSDP benefits.
- d. Health insurance
- A suspended employee's health insurance coverage continues until the end of the month in which the suspension began, except that there shall be no break in coverage if the employee is reinstated in time to work half of the workdays in the following month.
  - If the length of the period of suspension results in a break in health insurance coverage, the suspended employee must be notified that he/she may retain his or her group insurance coverage for up to 12 months by paying the monthly insurance premiums (both the employee's and state's contribution) in advance and in accordance with state guidelines. This 12 month extension runs concurrently with the 18 months granted under the Extended Coverage provisions of the health benefits plan.
- e. Life insurance
- Life insurance coverage may continue for up to 24 months, with the agency making the full contribution.

### 3. Pay and Benefits upon Reinstatement

#### a. Reinstatement from Suspension

- If an agency reinstates a suspended employee with back pay for any period of the suspension, unless directed otherwise in the hearing officer's decision, health benefits must be made effective retroactive to

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the date of reinstatement. The agency shall make appropriate refund(s) to the employee for the State portion of any health insurance premiums that he or she paid to continue coverage during the suspension.

- If an agency reinstates a suspended employee without back pay, there shall be no reimbursement for any portion of health insurance premiums that he or she paid to continue coverage.

### b. Reinstatement from Termination

- If an agency reinstates a terminated employee with back pay, unless otherwise directed in the hearing officer's decision, health benefits must be made effective retroactive to the date of termination.

#### **Note:**

*Suspended and terminated employees may have purchased individual health insurance coverage or acquired coverage through a spouse's health benefits plan. Agencies should inquire about such coverage when discussing back pay and benefits with these employees. If the hearing officer does not grant back benefits because the employee was enrolled in other coverage during the period of suspension or termination, the employee must provide proof of the other coverage.*

## **E. Due Process**

*Prior to the issuance of any Written Notices, demotions, transfers with disciplinary salary actions, suspensions or terminations, Agency Human Resource Directors or their designees should review the documentation for the recommended actions to determine if the action is appropriate for the offense; if a referral to the employee assistance program is advisable; and what the final recommendation for corrective action should be.*

### **1. Advance Notice of Discipline to Employees**

Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

### **2. Employee Response and "Reasonable Opportunity to Respond"**

Employees must be given a reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary actions. *Normally*, a 24 hour period is a sufficient period of time, however, a "reasonable opportunity to respond" should not be based solely on the quantity of time provided but

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also on the nature of the offense, which may or may not require more or less time to refute or mitigate the charge.

### **F. Use of Grievance Procedure**

1. Classified, non-probationary employees may challenge corrective or disciplinary actions through the Employee Grievance Procedure, and may direct questions regarding this procedure to the Department of Employment Dispute Resolution.

**Note:** *Employees hired after July 1, 2006 under the Higher Education Restructuring Act are not covered by the Virginia Personnel Act, but do have access to the State Grievance Procedure.*

#### **2. Hearing Officer's Authority**

- a. General authority  
A *hearing officer* may uphold, reduce or rescind corrective or disciplinary actions taken by an agency so long as the officer's decision is consistent with written policy.
- b. Reinstatement by a *hearing officer*  
When a *hearing officer* orders an employee's reinstatement from suspension or termination the hearing officer may order:
  - full, partial, or no back pay; and/or
  - a reduction in the employee's disciplinary record such that termination no longer could take place (e.g., the employee has only three Group I Written Notices or one Group II Written Notice). The officer must reinstate the employee with full back pay (minus an appropriate disciplinary suspension, if he/she wishes).
  - credit for annual and sick leave that the employee did not accrue during the period of discharge and/or suspension.
- c. Interim earnings  
A hearing officer's award of back pay shall be offset by any interim earnings that the employee received during the period of separation, including unemployment compensation received from the Virginia Employment Commission.
- d. Repayment of health insurance premiums



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- If a *hearing officer* orders reinstatement with back pay for any period of suspension or from termination the employee shall receive reimbursement for any health insurance premiums that he or she paid during the period that would have been paid by the agency.
- If a *hearing officer* orders reinstatement without back pay, the employee shall not receive reimbursement for any portion of the health insurance premiums that he or she paid during the separation.
- Hearing officers have the authority to exclude back benefits for health insurance coverage if the employee was enrolled in other coverage during a period of suspension or termination and awarding back benefits would present undue financial hardship to the employee. The employee must provide proof of the other coverage.

### **G. Records Management**

1. Agencies must update payroll and/or PMIS records immediately upon issuance of a Written Notice, upon placing employees on pre-disciplinary leave or disciplinary suspension, and upon subsequent demotions or transfers with disciplinary salary actions, terminations, or reinstatements.
  - a. The active periods for Written Notices are definite and may not be extended due to an employee's absence.
  - b. Written Notices that are no longer active shall not be considered in an employee's accumulation of Written Notices; *however, an inactive notice may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated. For example, misconduct which if a "first" offense would normally be addressed through counseling may warrant a Written Notice when the employee has an inactive Notice on file for the same misconduct.*
  - c. Written Notices shall be kept in employees' agency personnel files, including those that are no longer active.

***Exception:*** A Written Notice must be removed from an employee's personnel file if the agency modifies or vacates its disciplinary action. If, through the grievance procedure, it is determined that the Written Notice issued was not justified, the hearing officer may direct its removal from the employee's personnel file. Such notices shall not be destroyed but shall be retained in a grievance file or separate confidential file and shall not be considered in relation to any future disciplinary or other personnel action.

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## H. Removal Due to Circumstances which Prevent Employees from Performing their Jobs

### 1. Inability to meet working conditions

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section.

Reasons include:

- loss of driver's license that is required for performance of the job;
- incarceration for an extended period;
- failure to obtain license or certification required for the job;
- loss of license or certification required for the job;
- inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered;
- failure to successfully pass an agency's background investigation;
- conviction of a misdemeanor crime of domestic violence for employees whose jobs require: (a) carrying a firearm; or (b) authorization to carry a firearm; or
- failure to timely present appropriate documentation of identity and eligibility to work in the U.S. as required by federal law.

Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. Final notification of removal should be via memorandum or letter, not by a Written Notice form.

Employees may challenge removals through the Employee Grievance Procedure, and may direct questions regarding this procedure to the Department of Employment Dispute Resolution.

Agencies may, based on mitigating circumstances, demote or transfer and reduce the employee's duties with a minimum 5% reduction in salary, or transfer them to an equivalent position without a reduction in salary as an alternative to termination.

## I. Terminations

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*Refer to Policy 1.70, Termination/Separation from State Service for additional information on the disposition of leave and other benefits upon separation from state service.*

## Glossary

### **Corrective action**

Any intervening informal or formal counseling action taken by management to address employment problems, such as unacceptable performance, behavior, or misconduct.

### **Counseling**

Counseling may be an informal or formal intervention that consists of a discussion between an employee and his or her supervisor regarding problems with the employee's work performance, behavior, and/or conduct. Formal counseling discussions must be documented in a written memorandum. Counseling that is related to work performance may be included in an interim performance evaluation as described in Policy 1.40, Performance Planning and Evaluation.

### **Criminal Charge**

An arrest or indictment by authorities or entities outside of the employer agency against an employee for the commission of a criminal offense.

### **Criminal Offense**

Criminal Offenses include felonies and misdemeanors as defined in the statutes of the United States, the Commonwealth of Virginia, other sovereign states, and other city and county governments. Criminal offenses shall not include traffic or other charges that are specifically differentiated and exempted from statutory criminal offenses; however, DUI or other formal charges which impact an employee's ability to drive a vehicle or could result in incarceration if convicted shall be considered criminal charges.

**Interim evaluation:** A performance evaluation completed during the performance cycle to document and assess an employee's progress toward achieving the performance plan. If agencies desire to use a form for this purpose, they may use the form provided with Policy 1.40, Performance Planning and Evaluation, or develop their own forms. Interim Performance Evaluations are not considered "official" documents and are retained in the supervisor's confidential file for use in constructing the annual performance evaluation. Counseling, particularly when related to work performance, may be part of an interim evaluation.

### **Disciplinary action**

A formal action taken in response to unacceptable performance or misconduct. Disciplinary actions include the issuance of Written Notices; suspensions; demotions; transfers; disciplinary salary actions; and terminations.

### **Disciplinary Demotion**

Management initiated assignment of an employee to the same or a different position in the same or lower Pay Band with less job responsibilities that must result in a minimum of a 5% reduction in base salary. In no case may an employee's salary exceed the maximum of the pay band following

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a disciplinary salary action.

## **Disciplinary Review**

A process that involves reviewing the facts and circumstances surrounding misconduct or unacceptable performance in order to determine if disciplinary action is warranted.

## **Disciplinary Salary Action**

Employees may be retained in their current positions and have their duties reduced, be demoted, or transferred to positions in the same or lower pay band *with less job responsibilities* in lieu of termination. The employee's salary in each case must be reduced by at least 5%. In no case may an employee's salary exceed the maximum of the pay band following a disciplinary salary action. *(Agencies have the authority to transfer employees to equivalent positions as part of the disciplinary process without a reduction in salary.)*

## **Due Process**

Prior to any pre-disciplinary or disciplinary actions employees must be given oral or written notification of an offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond. Agencies must provide a clear and descriptive explanation of the offense in a manner that ensures that the employee understands the facts presented and will be able to present mitigating factors or denial of the charge.

## **Pre-disciplinary Leave**

Pre-disciplinary Leave is leave *with pay* to be used when disciplinary action is being considered and the employee's removal from the workplace is necessary or prudent because: their continued presence may be harmful to the employee, other employees, clients, and/or patients; makes it impossible for the agency to conduct business; may hamper an internal agency investigation into their alleged misconduct; may hamper an investigation being conducted by law enforcement; or may constitute negligence in regard to the agency's duties to the public and/or other employees.

## **Progressive Discipline**

A system of increasingly significant measures that are utilized to provide feedback to employees so that they can correct conduct or performance problems. It is most successful when provided in a way that helps an employee become a fully contributing member of the organization. Progressive discipline also enables agencies to fairly, and with reliable documentation, terminate an employee who is unable or unwilling to improve his/her workplace conduct and/or job performance.

## **Reasonable Opportunity to Respond**

Employees must be given a reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary action. Normally, a twenty-four hour period is sufficient, however a "reasonable opportunity to respond" should not be based solely on the quantity of time provided but also on the nature of the offense, which may or may not require time to refute or mitigate the charge.

## **Standards of Conduct**

Positive expectations for work performance, conduct, and behavior.

## **Suspension**

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An employee's absence from work, without pay, that an agency imposes as a part of a disciplinary action.

## **Unacceptable Conduct/Misconduct**

Employee conduct or behavior that is inconsistent with state or agency standards for which specific corrective or disciplinary action is warranted.

## **Workday**

*For purposes of suspensions without pay*, workday is defined as 8 hours for non-exempt employees. For exempt employees a workday is comprised of the hours scheduled to work on a normal day.

## **Workweek**

A fixed period of seven consecutive 24-hour periods which is established by the employer for each employee. It may begin on any day of the week and at any hour of the day; it need not coincide with the calendar week. Full-time employees normally work a five-day, 40-hour schedule during a workweek.