



# *State Employee Misconduct*

Handling of Allegations by the  
Department of Human Resources and  
Selected Organizations Needs  
Improvement in Documentation and  
Timeliness



## Mission Statement

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Dear Colleagues,

Employee misconduct is a serious matter that can take many forms, including inappropriately accessing confidential information, misusing state resources, falsifying records, discrimination, and sexual assault. Decisions on how to handle misconduct cases can have major consequences for both the employee and the State. Employees can lose their jobs, be demoted, or be suspended without pay. The State may incur the financial and operational consequences of paying employees under investigation who are not working (called temporary relief from duty status). For example, the State paid an estimated \$877,000 in salaries and benefits through December 31, 2016 for 49 employees in the five selected organizations in this status for misconduct cases opened in 2014 - 2016 (the Vermont Veterans' Home accounted for more than half of this amount). The State also risks other detrimental impacts if it does not recognize or redress serious misconduct such as encouraging discrimination or jeopardizing employee safety and efficiency, which could result in substantial civil liability.

We conducted this audit to (1) evaluate how decisions to investigate alleged employee misconduct by Department of Human Resources (DHR) and selected organizations are made, (2) assess the extent to which investigations into alleged misconduct of employees by DHR and selected organizations are documented and completed in a timely manner, and (3) characterize the types of resolutions to alleged employee misconduct cases and evaluate the processes used by DHR and selected organizations to decide which type is appropriate. Our scope was misconduct cases opened in 2014, 2015, and 2016 related to the Agency of Transportation (AOT), except for the Department of Motor Vehicles; Department of Buildings and General Services (BGS); Department of Labor (DOL); Department of Public Safety (DPS) civilian employees; and the Vermont Veterans' Home (VVH). It included processes and decisions by these organizations and DHR. In general, the organizations are the final decisionmakers in misconduct cases, guided by DHR.

We were unable to evaluate the decisions by the organizations on whether and by whom investigations of allegations of misconduct were to be conducted due to a lack of documentation. Only those allegations that an appointing authority or designee decided to investigate were recorded and tracked. Moreover, investigations of employee misconduct were not always well documented as over 20 percent of the 70 misconduct cases reviewed did not have reports that covered the events and actions that were alleged.

Once the investigations were completed, the appointing authorities or designees at AOT, BGS, DOL, DPS, and VVH utilized a wide range of resolutions to close the misconduct cases reviewed, such as determinations that the allegation was unsubstantiated, discipline (e.g., reprimand, suspension), and stipulated agreements (a negotiated settlement between the State and employee). However, the process used to decide on these outcomes sometimes lacked documentation about who made the decisions and when, the rationale for the decision to impose a particular type of discipline, and how progressive discipline is being applied.

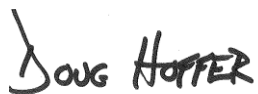
Moreover, in 10 cases (14 percent), there was no evidence that either the case was resolved or that the disposition was carried out.

In many cases neither the investigations nor the decisions on dispositions were completed in a timely manner. Only about half of the investigations and an eighth of the decisions on the disposition of the cases reviewed were completed within targeted timeframes of 60 and 30 days, respectively. There are external and internal circumstances that can make these targets unreachable in certain circumstances (e.g., criminal cases, due process procedures), but it is important to resolve allegations of misconduct in a timely manner. The longer it takes to render a disposition decision, the higher the risk that disciplinary action (if applicable) taken by the State could be overturned. The Vermont Labor Relations Board (VLRB) precluded management from disciplining employees for alleged offenses when it found that the State violated the collective bargaining agreement's provision for prompt action.

We made a variety of recommendations to DHR and the selected organizations to improve how they handle employee misconduct cases. The commissioner of DHR provided comments on a draft of this report that were coordinated with the other departments in our scope. The DHR commissioner generally indicated that they do not plan to implement our recommendations because (1) they were not required by State statute, personnel policies, the Collective Bargaining Agreements (CBAs), and decisions by the VLRB and the courts (called "guiding authorities" in the commissioner's response) and (2) they called for additional documentation of decisions that DHR considered burdensome and unnecessary. We disagree. While the State's internal processes should be informed by, and consistent with, the sources named by the commissioner, she cited no evidence that the State is prohibited from developing operational practices to document their critical decisions and significant events, as called for in the State's own internal control standards. Moreover, DHR took issue with our using as criteria in this report its own standards and guidance, as contained in its misconduct protocol and training materials. We find this position incongruous. Accordingly, we continue to believe that our recommendations to improve the documentation of the State's operational practices and decisions should be implemented. It is our view that choosing to rely on verbal guidance and individuals' memories is misguided and increases the risk of poor decision-making.

I would like to thank the staff at AOT, BGS, DOL, DPS, VVH, and DHR for their cooperation and professionalism during this audit. This report is available on the state auditor's website, <http://auditor.vermont.gov/>.

Sincerely,



DOUGLAS R. HOFFER  
State Auditor

ADDRESSEES

The Honorable Mitzi Johnson  
Speaker of the House of Representatives

The Honorable Phil Scott  
Governor

Mr. Andrew Pallito  
Commissioner, Department of Finance and Management

Mr. Joe Flynn  
Secretary, Agency of Transportation

Mr. Christopher Cole  
Commissioner, Department of Buildings and General Services

Ms. Melissa Jackson  
Chief Executive Officer, Vermont Veterans' Home

The Honorable Tim Ashe  
President Pro Tempore of the Senate

Ms. Susanne Young  
Secretary, Agency of Administration

Ms. Beth Fastiggi  
Commissioner, Department of Human Resources

Ms. Lindsay Kurrle  
Commissioner, Department of Labor

Mr. Thomas Anderson  
Commissioner, Department of Public Safety

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# Introduction

Employees may commit misconduct if they deliberately or negligently fail to comply with the requirements of the state workplace. Allegations of misconduct can include fraud, absenteeism, abuse of authority, sexual harassment, discrimination, or criminal activity (on-duty or off-duty). Failure to recognize or redress serious misconduct can have broad and detrimental impacts, such as repeated fraud and abuse, encouraging discrimination, and jeopardizing workplace safety and efficiency, resulting in substantial civil liability. Surveys by the Department of Human Resources (DHR) indicate many state employees believe that there is room for improvement in how the State handles misconduct. For example, in 2016 only 61 percent of state employee respondents agreed with the statement, “I am confident that any misconduct that I report will be handled properly.”

Due in part to the survey results, we conducted two concurrent audits of how state government handles employee misconduct.<sup>1</sup> The audit objectives of this report are to: (1) evaluate how decisions to investigate alleged employee misconduct by DHR and selected organizations are made, (2) assess the extent to which investigations into alleged misconduct of employees by DHR and selected organizations are documented and completed in a timely manner, and (3) characterize the types of resolutions to alleged employee misconduct cases and evaluate the processes used by DHR and selected organizations to decide which type is appropriate.

The scope of our audit was misconduct investigations opened in 2014, 2015, and 2016<sup>2</sup> for the Agency of Transportation (AOT), except for the Department of Motor Vehicles (DMV); Department of Buildings and General Services (BGS); Department of Labor (DOL); Department of Public Safety (DPS) civilian employees; and the Vermont Veterans’ Home (VVH).<sup>3</sup> Much of our analysis is based on 70 misconduct cases we judgmentally chose to test. We focused on these cases because the data in the DHR investigation system was not sufficiently reliable to perform broader analyses (see Other Matters section). Appendix I contains detail on our scope and methodology. Appendix II contains a list of abbreviations used in this report.

<sup>1</sup> We conducted two audits because the Agency of Human Services (AHS) has its own investigations unit, while the DHR investigations unit (DHR IU) investigates other state organizations. See the report entitled *Agency of Human Services: Process and Documentation Improvements Could Better Support Decision-Making in Employee Misconduct Cases*. The State Police also have an internal investigations unit, which we did not audit.

<sup>2</sup> Not all misconduct cases undergo an investigation. For example, employees may be disciplined for failing to report to work without a formal investigation.

<sup>3</sup> For purposes of the report, the use of the term AOT excludes DMV and the use of the term DPS excludes sworn officers of the State Police.



# Highlights

Because some state employees appeared skeptical of how the State handles employee misconduct, we conducted an audit to (1) evaluate how decisions to investigate alleged employee misconduct by DHR and selected organizations are made, (2) assess the extent to which investigations into alleged misconduct of employees by DHR and selected organizations are documented and completed in a timely manner, and (3) characterize the types of resolutions to alleged employee misconduct cases and evaluate the processes used by DHR and selected organizations to decide which type is appropriate. The selected organizations in our scope were AOT (except for DMV), BGS, DOL, DPS (except for sworn officers), and VVH.

## Objective 1 Finding

It was not possible to evaluate decisions on whether and by whom investigations of allegations of misconduct were to be conducted because not all allegations of employee misconduct were logged. Allegations are initially reviewed by DHR units to determine if the allegation is misconduct and if they should recommend to the applicable appointing authority<sup>4</sup> (AA) that an investigation be opened. Only those allegations that the AAs decided to investigate and reported to the DHR investigations unit (DHR IU) were recorded and tracked. The AA is also responsible for the decision to assign the investigation to the DHR IU, internal management, or DHR field operations staff. A January 2015 DHR protocol for employee misconduct investigations lists specific allegations to be investigated by the DHR IU; this requirement appeared to be followed.

The AA can decide to place an employee on paid temporary relief from duty (RFD) for up to 30 workdays while an investigation is conducted or if in the judgement of the AA, the employee's continued presence at work during the investigation period is detrimental to the best interest of the State, the public, the ability of the office to perform its work in the most efficient manner, or the well-being or morale of persons under the State's care. Employees are to be notified in writing if they are temporarily relieved from duty, but there were cases in which the employee continued in RFD status past the initial 30-day period without notification. In the organizations in our scope, the State paid an

<sup>4</sup> An appointing authority is the person authorized by statute or lawfully-delegated authority to appoint and dismiss employees.

estimated \$877,000 in salary and benefits for employees on RFD for misconduct cases opened in 2014 – 2016, through December 31, 2016.

## Objective 2 Finding

Investigations into alleged misconduct of employees were not always documented by the organizations in our scope, primarily by VVH. Investigation reports that covered all the allegations of misconduct were not issued in 20 of 70 misconduct cases reviewed. In five of these cases, either the employee resigned during the investigation or was dismissed while on probation prior to the conclusion of the investigation. In the remaining 15 cases without an investigation report (21 percent), there was no evidence that a report was completed. Indeed, for six VVH misconduct cases, the only evidence we were provided of the investigation was a letter to the employee notifying them that an investigation was to be conducted. Without reports documenting the investigative steps and findings of an investigation, the State may have a difficult time defending how cases were resolved.

The State does not have an overall standard for how long an investigation should take, although the DHR IU attempts to deliver a report within 60 days. The median length of time that it took investigations to be completed for the 50 cases in which an investigation length could be determined was 60 days, with about half exceeding this number. DHR staff cited a variety of internal and external factors as to why investigations took longer than 60 days, including that the employee was involved in a criminal case or was not available. Timeliness of reports is important because the State's collective bargaining agreements require the State to act promptly to impose discipline within a reasonable time of the offense.

## Objective 3 Finding

The AA or designees at AOT, BGS, DOL, DPS, and VVH utilized a wide range of outcomes to resolve the misconduct cases we reviewed. The process used to decide these outcomes sometimes lacked documentation about who made the decisions and when, the rationale for the decision to impose a particular type of discipline, and how progressive discipline<sup>5</sup> was applied (if applicable). There were no records kept of meetings that were held to discuss the results of investigations and next steps to be taken, so it was not always clear when a decision was made and by whom. In addition, there was no reliable central source to determine whether an employee has been the subject of previous disciplinary action or had signed a stipulated agreement for prior misconduct acknowledging that it was the employee's "last chance." Without assurance that

<sup>5</sup> The State's collective bargaining agreements (CBAs) and policy provide for discipline to be applied in the following order unless there are circumstances that warrant the progression being bypassed: oral reprimand, written reprimand, suspension without pay, demotion (optional), and dismissal.

an employee's discipline history is complete, the AA or designee risks making an inappropriate decision.

The three most common types of resolution of the misconduct cases reviewed were: (1) disciplinary action, such as suspensions or terminations (36 percent), (2) unsubstantiated misconduct (16 percent), and (3) stipulated agreements<sup>6</sup> (13 percent). However, in 10 cases (14 percent), there was no evidence that the case was resolved or that the disposition was fulfilled. Eight of these ten cases were from the VVH. The State has a target of 30 days to reach a disposition from the conclusion of an investigation. Only 13 percent of cases reviewed met this target (only includes the 45 cases in which we could calculate the timeframe). The median time for these cases was 73 days (67 days for AOT, 87 days for BGS, 63 days for DOL, 41 days for DPS, and 261 days for VVH). Fifteen of these 45 cases (33 percent) took more than 90 days to resolve.

## Other Matters

We limited our audit work to reviewing 70 misconduct cases because the data in the system used to track misconduct investigations was not sufficiently reliable for purposes of our objectives. For example, the system did not have a user manual that described the fields in the site nor how these fields were to be populated. In addition, there were records with logical anomalies and/or inaccuracies or blanks. Moreover, the system did not contain all misconduct cases as there were many cases (primarily at VVH) that were not entered.

DHR has a performance measure for the timeliness of DHR IU investigations (90 days). However, this measure is not consistent with the 60-day standard established for the completion of DHR IU investigations established in a January 2015 protocol on employee misconduct investigations, nor does it include investigations completed by department management or DHR field operations staff. DHR has not established a performance measure for how long it takes for a case to be resolved (e.g., discipline imposed), even though it has a 30-day target for this action.

## Recommendations

We made a variety of recommendations to the Department of Human Resources intended to improve the handling of employee misconduct allegations, including how decisions to investigate and dispose of allegations are documented. We also made recommendations to the five organizations in our scope on improving how decisions to dispose of cases are documented.

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<sup>6</sup> This is a negotiated settlement between the State and employee.

# Background

## Roles Related to Addressing Employee Misconduct

Multiple organizations have a role in decisions to investigate and discipline misconduct by state employees. The roles of DHR and the appointing authorities (AA)<sup>7</sup> are generally covered by the State's collective bargaining agreements (CBA) with the Vermont State Employees' Association, Inc. (VSEA)<sup>8</sup> and the State's Personnel Policy and Procedure Manual.<sup>9</sup> In general, the departments are the final decisionmakers, guided by DHR.

- *State entities.* The heads of these organizations along with their deputies serve as AAs. AAs or their designees are responsible for deciding (1) whether an allegation will be investigated, (2) the scope of the investigation and the investigator (i.e., internal management, the DHR IU, or DHR field operations staff), and (3) the disposition of the case.
- *DHR investigations unit (DHR IU).* This unit conducts labor investigations upon request by the HR manager. The DHR IU is supervised by the DHR general counsel and has three professional investigators (as of May 3, 2017, one investigator position was vacant).
- *DHR field operations unit.* This unit provides field support and services to the executive branch via teams embedded within agencies and departments. These teams play a critical role in addressing employee misconduct, including receiving and forwarding allegations, performing investigations, providing advice and recommendations to the AA or designee on the resolution of a case, and drafting required documents.
- *DHR labor relations unit.* This unit negotiates, interprets, and administers the CBAs, which include provisions for imposing discipline for misconduct. The director of this unit approves and signs all stipulated agreements—a negotiated settlement between the State and employee—except for those negotiated by the Office of the Attorney General. This unit also provides field support services to the VVH.

<sup>7</sup> An appointing authority is the person authorized by statute or lawfully-delegated authority to appoint and dismiss employees.

<sup>8</sup> The VSEA is the exclusive representative of Vermont state employees for the Non-Management Bargaining Unit, Supervisory Bargaining Unit, and Corrections Bargaining Unit. The Vermont Troopers' Association, Inc. is the exclusive representative for the State Police Bargaining Unit. Neither the State Police nor the Corrections CBAs are applicable to our audit objectives and scope.

<sup>9</sup> Exempt, appointed, or temporary employees are not covered by the CBAs. Certain types of personnel rules and regulations apply to all employees (such as the policy on employee conduct), but other policies that lay out specific procedures to be followed (such as the grievance procedures) do not apply to exempt, appointed, or temporary employees.

- *DHR legal unit.* This unit assists the labor relations unit in interpreting the CBA and DHR policies. It also provides guidance to the field operations unit on decisions related to misconduct cases.

## Non-AHS Employee Misconduct Cases, 2014 - 2016

The DHR IU uses a SharePoint® system site<sup>10</sup> to track employee misconduct investigations, including those conducted by other non-AHS organizations.<sup>11</sup> For example, DHR uses the site to track when an investigation was opened and closed, as well as the type and date of disposition of the case.

Table 1 contains the number of misconduct cases by organization (except for AHS) for calendar years 2014 – 2016, as contained in the DHR IU SharePoint® site, as well as a count of employees as of December 29, 2016. This table understates the number of employee misconduct cases because the SharePoint® site does not contain all cases (see Other Matters section). In particular, the VVH did not have access to the DHR IU SharePoint® site until 2017, and therefore, 179 of 188 VVH misconduct cases were not in the DHR IU SharePoint® system.<sup>12</sup>

<sup>10</sup> SharePoint® is a Microsoft® product that is used to create and manage custom team-focused and project-focused websites to store, organize, share, and access information.

<sup>11</sup> Since 2015, the Agency of Human Services Investigations Unit has used its own SharePoint® site to track employee misconduct cases for this agency and its departments.

<sup>12</sup> The 179 cases were based on a list of notice of investigation letters provided by the HR administrator for VVH.

**Table 1: Number of Non-AHS Employee Misconduct Cases by Organization as Recorded in the DHR IU SharePoint® Site, 2014 – 2016<sup>a</sup>**

Organization	Employee Count, as of 12/29/16 <sup>b</sup>	Misconduct Cases			
		2014	2015	2016	Total
Agency of Transportation (Non-DMV)	1,035	43	31	13	87
Buildings & General Services	331	8	15	19	42
Labor	245	10	9	7	26
Department of Motor Vehicles	232	6	6	6	18
Public Safety – Civilian	293	5	4	7	16
Environmental Conservation	292	2	5	4	11
Liquor Control	54	7	3	1	11
Fish & Wildlife	132	5	2	2	9
Vermont Veterans' Home	180	3	4	2	9 <sup>c</sup>
Education	145	1	3	3	7
Secretary of State	71	3	2	1	6
Taxes	154	0	1	4	5
State Treasurer	32	2	0	2	4
Public Service Board	27	2	2	0	4
Agency of Administration	22	2	0	1	3
Agency of Agriculture, Food & Markets	110	3	0	0	3
Forests, Parks & Recreation	103	1	2	0	3
Department of Information and Innovation	104	1	2	0	3
Military	124	1	1	1	3
Green Mountain Care Board	26	1	2	0	3
Attorney General	78	1	0	2	3
Human Resources	91	1	0	1	2
Agency of Commerce & Community Development	93	1	0	0	1
Financial Regulation	100	0	0	1	1
Libraries	11	0	0	1	1
Public Safety – Sworn	275	1	0	0	1
Lottery Commission	20	1	0	0	1
Natural Resources Board	22	0	0	1	1
<b>Grand Total</b>	<b>4,402</b>	<b>111</b>	<b>94</b>	<b>79</b>	<b>284</b>

- <sup>a</sup> Organizations without any employee misconduct investigations in SharePoint® were not included in this table.
- <sup>b</sup> The source of this column is the state's workforce dashboard except for DMV, which is from the fiscal year 2018 Governor's recommended budget. We subtracted the DMV count from the AOT employee count contained in the dashboard.
- <sup>c</sup> There are an additional 179 cases at VVH that were not entered into the DHR IU SharePoint® site.

We performed procedures on the data in the DHR IU SharePoint® system and found that they were not sufficiently reliable for our audit objectives

(see Other Matters section). Accordingly, instead of relying on the data in the DHR IU system, we judgmentally chose 70 cases to evaluate: 20 AOT cases, 10 BGS cases, 10 DOL cases, 10 DPS cases, and 20 VVH cases (15 of the VVH cases were selected from the list of 179 cases not included in the SharePoint® system). The selection included 24 cases opened in 2014, 29 in 2015, and 17 in 2016. Appendix I contains a description of how we chose these cases.

## Objective 1: Documentation Lacking on Decisions Related to Allegations

It was not possible to evaluate DHR's or the selected organizations' decisions on whether and by whom investigations of allegations of misconduct were to be conducted, because DHR and the departments did not record all allegations, only those for which investigations were conducted. Once a decision is made to investigate an allegation, DHR has established criteria for deciding the types of cases to be investigated by the DHR IU. These criteria were generally followed.

According to the CBAs, an appointing authority may relieve employees from duty temporarily with pay for up to 30 work days to (1) permit the appointing authority to investigate or make inquiries into charges and allegations made by or concerning an employee or (2) if in the judgement of the AA the employee's continued presence at work during the investigation period is detrimental to the best interest of the State, the public, the ability of the office to perform its work in the most efficient manner, or the well-being or morale of persons under the State's care. During 2014 – 2016, the State paid an estimated \$877,000 in salary and benefits for employees in the five organizations in our scope who were placed in RFD status. Most of the employees in RFD status and associated costs were in the VVH.<sup>13</sup>

### Decisions Related to Investigations of Allegations

Allegations of employee misconduct come from many sources, such as management, other employees, or the public. The severity of allegations is also wide-ranging. For example, the allegations in the 70 cases reviewed included rudeness to a member of the public or a co-worker, inappropriately accessing confidential information, misusing state resources, failing to follow

<sup>13</sup> These numbers do not include misconduct cases started in 2013 and continued into 2014 or employees placed in RFD status for non-misconduct reasons.

a supervisor's order, failing to follow work rules, falsifying records, discrimination, and sexual assault.

The State's current policy on employment-related investigations requires the AA or designee to notify and coordinate with DHR whenever they have reason to suspect that an employee has engaged in misconduct.<sup>14</sup> Under the State's sexual harassment and discrimination policies, all complaints are to be referred immediately to DHR personnel, who are to coordinate with the responsible AA to ensure that a timely and complete review of the complaint is made.<sup>15</sup> Further, the State's internal control standards emphasize the importance of documenting critical decisions and significant events.<sup>16</sup> By recording the information related to such events, management creates an organizational history that can serve as justification for subsequent actions and decisions.

In January of 2015, the DHR director of field operations issued a protocol for employee misconduct investigations. According to the protocol, agency managers should contact their assigned human resources (HR) manager upon being made aware of a matter that involves alleged misconduct. According to the HR managers, they are supposed to bring the matter to the DHR legal and labor relations units (collectively known as LEGOR) for an analysis of the allegation and a recommendation of how to proceed. LEGOR is to determine if the allegation is possible misconduct and, if so, the HR manager and AA are so informed. According to DHR policy, the AA, in turn, then becomes responsible for decisions on how to proceed.

Discussions with HR managers indicated that they generally followed the process outlined in the protocol. However, they also indicated that in some cases they may choose not to bring an allegation to the attention of LEGOR or the AA. For example, an HR manager explained that upon receiving an allegation, he gathers additional information to determine whether the allegation may require discipline. If the allegation is determined to be low level, the HR manager might handle the situation himself.

There is no record of LEGOR decisions or a log of allegations and what, if any, action was taken (unless the decision was to investigate, at which point a record should be added to the DHR IU SharePoint® site). Without documentation of all allegations and the actions taken by the AAs for each of

<sup>14</sup> *Employment Related Investigations* (Personnel Policy Number 17.0, November 3, 2016). The prior version of this policy (dated March 1, 1996) stated that HR personnel should be consulted throughout the course of an investigation.

<sup>15</sup> *Sexual Harassment* (Personnel Policy Number 3.1, March 1, 1996) and *Discrimination Complaints* (Personnel Policy Number 3.3, July 1, 1999).

<sup>16</sup> *Internal Control Standards: A Guide for Managers* (State of Vermont Department of Finance and Management).



the allegations, it was not possible to evaluate the appropriateness of decisions not to investigate.

Once a decision has been made to pursue an allegation, the AA will decide which organization (DHR IU, DHR field operations unit, or department personnel) will conduct the investigation. According to the January 2015 protocol for employee misconduct investigations, all Equal Employment Opportunity cases and allegations of discrimination, harassment, retaliation, theft, fraud, or criminal activity are to be investigated by the DHR IU. This policy generally seemed to be applied, as we found only six cases that met this criteria that were not handled by the DHR IU, and the rationale for these decisions was documented.<sup>17</sup>

Of the 70 misconduct cases reviewed, 27 (39 percent) were investigated by the DHR IU. The remaining cases were assigned to the applicable department (28) or DHR field operations staff (13), or it could not be determined (2). It did not take long for these organizations to start investigations; the median number of days that it took from the allegation being reported to the date the investigation was opened was 5 days.<sup>18</sup>

## Temporary Relief from Duty

According to the CBAs, an appointing authority may relieve employees from duty temporarily with pay for up to 30 work days to (1) permit the appointing authority to investigate or make inquiries into charges and allegations made by or concerning an employee or (2) if in the judgement of the AA the employee's continued presence at work during the investigation period is detrimental to the best interest of the State, the public, the ability of the office to perform its work in the most efficient manner, or the well-being or morale of persons under the State's care.

Table 2 shows estimates of the amount of salary and benefits the State paid for 49 AOT, BGS, DOL, DPS, and VVH employees in RFD status between January 1, 2014 – December 31, 2016, totaling \$877,000. Five employees were in RFD status on two separate occasions. The table also provides information on the average number of workdays and average estimated salary and benefits for the 51 misconduct cases that were completed by December 31, 2016 (three cases were still on-going as of this date). VVH had the highest average number of workdays of employees in RFD status. This average is affected by state regulations that govern staff treatment of residents of nursing homes, which include requirements pertaining to

<sup>17</sup> The 179 cases from the VVH that were outside of the DHR IU SharePoint® site were not reviewed as part of this analysis because the allegations connected with those cases were not available in summary form.

<sup>18</sup> This median is based on 51 misconduct cases. Documentation was not available to perform this calculation in 19 cases.

notification, investigation, and employment of staff alleged to have mistreated, neglected, exploited, or abused residents.<sup>19</sup>

**Table 2: Salaries and Benefits for AOT, BGS, DOL, DPS, and VVH Employees in Relief From Duty Status Due to Alleged Employee Misconduct, 2014 – 2016, as of December 31, 2016<sup>a</sup>**

State Organization	All RFD Cases, 2014 - 2016 <sup>b</sup>		Completed Misconduct Cases, 2014 – 2016		
	# of Instances of Employees on RFD Status <sup>c</sup>	Total Estimated Salary and Benefits, as of 12/31/16 <sup>d</sup>	# of Instances of Employees on RFD Status	Average # of Workdays on RFD Status	Average Estimated Salary and Benefits, as of 12/31/16 <sup>d</sup>
AOT (excludes DMV)	7	\$91,000	7	45	\$12,930
BGS	6	\$93,000	5	50	\$15,422
DOL	3	\$23,000	3	32	\$7,754
DPS (excludes sworn officers)	6	\$97,000	6	58	\$16,159
VVH	32	\$573,000	30	78	\$17,435
<b>Totals</b>	<b>54</b>	<b>\$877,000</b>	<b>51</b>		

- <sup>a</sup> This table does not include those cases that were opened in 2013 and continued into 2014 or those employees placed in RFD status for non-misconduct reasons.
- <sup>b</sup> These columns include three misconduct cases that started in 2016 that remained on-going as of the end of the year. The estimated payments for these cases is only through December 31, 2016.
- <sup>c</sup> Five employees had two instances of being placed in RFD status in 2014-2016.
- <sup>d</sup> These estimates were calculated by multiplying the number of hours on RFD by each employee's pay rate and then multiplying the total by each department's fringe benefit percentage for the appropriate fiscal year. The fringe benefit percentage calculation was derived from the actual fiscal year 2016, 2015, and 2014 salary and fringe benefit amounts in the fiscal year 2018, 2017, and 2016 executive budget recommendations, respectively. Because the fiscal year 2017 fringe benefit amounts were not yet available, we used the fiscal year 2016 percentage for the period July 1, 2016 to December 31, 2016.

There are also operational costs to departments when they place employees on RFD status, since these employees are not available to perform their duties. For example, if an employee on RFD performs critical duties that must continue in his or her absence, such as a DPS dispatcher or VVH nurse, it can disrupt schedules or cause other employees to incur overtime.

According to the CBAs, employees are to be notified in writing if they are temporarily relieved from duty. In addition, the CBAs require DHR to approve RFD periods of over 30 workdays. According to the DHR HR director, there is no required formal process by which the DHR staff need to concur in this decision. In addition, in at least 12 cases, the organizations in our scope did not send RFD extension letters to employees that covered the whole period of the RFD status when it exceeded 30 days. For example, an AOT employee was in RFD status between March 27, 2014 and July 29, 2014, but there was only

<sup>19</sup> *Licensing and Operating Rules for Nursing Homes* (AHS Department of Disabilities, Aging and Independent Living, December 15, 2001).

a single letter to the employee authorizing the RFD status for the first 30-day period.

Our companion audit of AHS misconduct cases found 17 instances in which an employee was maintained in RFD status well beyond the date the investigation had been completed, even though the employee was not later removed from state employ. For the organizations in the scope of this audit, there were two similar cases (one each at DPS and AOT) in which the RFD status was extended 14 days beyond the completion of the investigation and did not result in the removal of the employee from state employment.<sup>20</sup> If the State intends to return an employee to work, it is not fiscally prudent to continue to pay the salary and benefits of a non-working employee for weeks and sometimes months (in the case of AHS departments), as decisions are made on the final dispositions that are less than dismissal. We believe that the direct and indirect costs of keeping an employee in RFD status past the completion of the investigation could quickly exceed the benefit to the State if the department ultimately intends to return the employee to work.

There are few controls in the State's HR system that could reduce the likelihood of this occurring. According to the DHR administrative service director, when an employee is put in RFD status, a personnel action request (PAR) is sent to DHR and entered into the system. According to the director, there is no expiration date in many of the RFD PARs, so an employee is only taken off RFD if a new PAR is submitted. There are no time-period queries or checks on the RFD period in the system to determine the length of the RFD or if an extension was properly approved. Introducing such controls could lower the risk of keeping an employee in RFD status for too long.

## Objective 2: Some Cases Lacked Investigation Reports, and Many Took Over 60 Days to Complete

Investigation reports were completed in 50 of 70 (71 percent) of the 2014-2016 cases reviewed, and about half took over the 60 day target to complete. The reasons why investigation reports were not written varied. In some cases, the employee resigned while the investigation was ongoing, while in others a DHR official decided one was not necessary under the circumstances. Of the 50 reports completed, all but two covered all the events and actions that were alleged. The median time to complete an investigation was 60 days. However, in 24 of the 50 cases (48 percent), the investigation completion

<sup>20</sup> We chose 14 calendar days as a benchmark for our analysis to provide a reasonable period of time for AAs to decide on the likely disposition of a case.

time exceeded DHR's standard of 60 days (10 of these cases, or 20 percent, took over 120 days to complete). Timeliness of reports is important because the CBAs require the State to act promptly to impose discipline within a reasonable time of the offense. Both internal factors and external factors contributed to delays.

## Completion of Investigation Reports

Employee misconduct investigations involve the unbiased collection of facts. A well-done investigation can also help the State defend its actions to the Vermont Labor Relations Board (VLRB), Human Rights Commission, Equal Employment Opportunity Commission, or the courts.

According to the January 2015 employee misconduct investigation protocol, an investigation report should be completed for each investigation conducted by the DHR IU. The protocol does not address reporting requirements for investigations conducted outside of the DHR IU by a department or DHR field operations staff member. The State's internal control standards emphasize the importance of documenting critical decisions and significant events.<sup>21</sup> By recording the information related to an investigation, management creates an organizational history that can serve as justification for subsequent actions and decisions.

The State completed investigation reports in 50 of the 70 cases reviewed (71 percent). Of the reports issued, all but two addressed all of the allegations.<sup>22</sup> One failed to address all the allegations because multiple investigations were combined into a single report. In the second case, an additional allegation arose after the report was written, but it was handled in the same case as the original allegations. There was no update or addendum to the report to address the new allegation.

Of the 20 cases without reports, 3 were assigned to the DHR IU, 5 were assigned to DHR field operations staff and 10 were assigned to department officials. In two cases we could not determine if the case was assigned to a department or DHR official. In 5 of the 20 cases without reports, either the employee resigned during the investigation or was dismissed while on probation<sup>23</sup> prior to the conclusion of the investigation. However, in the remaining 15 cases (21 percent),<sup>24</sup> there was no evidence that a report was completed. For example, a DHR official decided that reports were not

<sup>21</sup> *Internal Control Standards: A Guide for Managers* (State of Vermont Department of Finance and Management).

<sup>22</sup> There were four cases in which we could not determine if all the allegations were addressed in the report because we did not find an independent source of the original allegations outside of the report itself.

<sup>23</sup> According to the CBAs, employees on probation may be dismissed by the State solely at the discretion of management.

<sup>24</sup> Of these 15 cases, 1 is from AOT, 1 is from BGS, 2 are from DOL and 11 are from VVH.

necessary under the circumstances in two cases. In six cases (all at the VVH), the only evidence of an investigation we were provided was a letter to the employee notifying them that an investigation was to be conducted. The HR administrator for VVH told us that she looked for additional documentation, but the responsible VVH official had left and the administrator did not find records of her investigations. Nevertheless, we believe that it was VVH's responsibility to ensure that records of investigations were created and maintained in a manner that can be retrieved, even if a staff member has left its employ. The VVH chief executive officer believes that some of the documentation is in a temporary storage trailer. However, according to the VVH HR administrator, only the 2014 cases would be stored in the trailer,<sup>25</sup> and our own inspection found no indication that such records are there.

Without reports documenting the investigative steps and findings of an investigation, the State may have a difficult time defending how cases were resolved. In addition, the State is not in a position to determine if investigations were complete and thorough. For example, a DOL case was opened in SharePoint® in 2014 pertaining to alleged retaliation by a manager that had led to a dismissal of an employee. This was consistent with emails sent by the then DHR general counsel to the counsel retained by the dismissed employee, stating that an investigation of the retaliation claims was ongoing. In 2015, the manager of the DHR IU stated that his unit had not conducted an investigation and closed the case as unsubstantiated. Because there was no investigation report, we could not determine whether the investigation had been conducted as asserted by the prior general counsel or that the resolution of unsubstantiated misconduct was supported.

## Timeliness of Misconduct Investigations

The CBAs require that the State act promptly to impose discipline within a reasonable time of the offense and, according to State policy, the AA must be reasonably diligent in conducting investigations.<sup>26</sup> According to the January 2015 protocol, the investigators in the DHR IU are to make an effort to complete all interviews and forward a final report to the HR manager within 60 days. This document does not set standards for timeliness for investigations conducted by department management or DHR field operations staff.

The median length of time between the date the investigation was opened to the date completed<sup>27</sup> was 60 days for the 50 tests cases with investigation

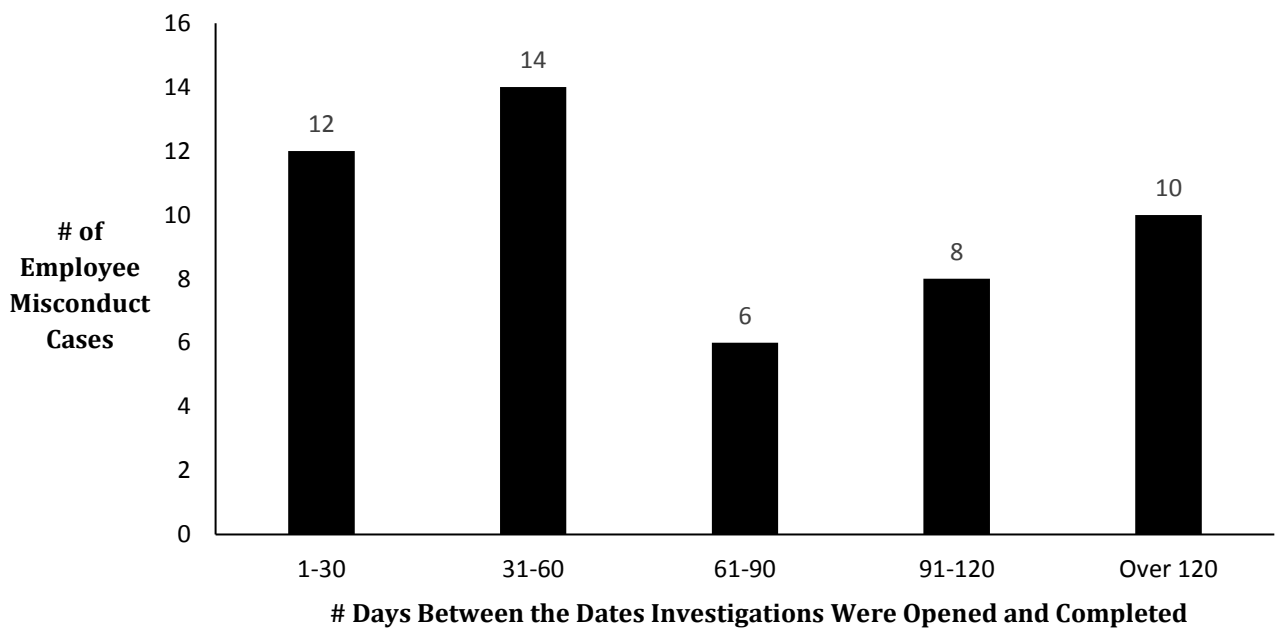
<sup>25</sup> Of the six cases in which the documentation provided was limited to the notice of investigation, only two were opened in 2014.

<sup>26</sup> *Disciplinary Action and Corrective Action* (Personnel Policy Number 8.0, March 1, 1996).

<sup>27</sup> According to the DHR IU manager, the investigation is complete as of the date of the investigation report.

reports.<sup>28</sup> In 24 of the 50 cases (48 percent), the investigation completion time exceeded the 60-day target in the January 2015 protocol. Twelve of the cases (24 percent) were completed within half the 60-day period while ten of the cases (20 percent) took more than twice as long, or over four months. Figure 1 shows the number of test cases in 30-day increments from the open date to the completion date. Because these cases were judgmentally chosen, these results cannot be projected to the universe of misconduct cases.

**Figure 1: Number of Investigations Completed Within 30 Calendar Day Increments for Test Cases<sup>a</sup>**



<sup>a</sup> The number of misconduct cases in this figure totals 50 because the investigation time could not be determined in the remaining cases due to lack of documentation.

Investigators at the DHR IU could not explain why investigations were taking longer than its 60-day target, stating that each case had unique circumstances. According to an HR manager, a variety of internal and external factors explain why investigations took longer than 60 days, such as the subject of the investigation being unavailable or having a pending criminal case.

<sup>28</sup> One report was not dated, so we used the date contained in the DHR IU SharePoint® site.

## Objective 3: Decision-Making Process for Resolving Misconduct Cases Often Lacked Documentation and Sometimes Took Months

Appointing authorities have several ways to resolve misconduct cases, including deciding that the allegation was unsubstantiated, imposing disciplinary action, or agreeing to a stipulated agreement. If an AA decides to impose discipline, the CBAs and State policy<sup>29</sup> require the State to apply discipline (1) with uniformity and consistency and (2) utilizing progressively more severe sanctions unless the circumstances warrant bypassing such progressive discipline. Parts of the State's process for reaching decisions on employee misconduct are not documented, making it difficult to tell (1) who is making the decisions and when, (2) the rationale for the decision to impose a particular type of discipline, and (3) how progressive discipline is being applied. Documentation is a critical element in an organization's internal control environment.

Regarding the 70 cases reviewed, the three most common types of resolution were disciplinary action, such as suspensions or terminations (36 percent), unsubstantiated misconduct (16 percent), and stipulated agreements (13 percent). However, in ten cases (14 percent), there was no evidence that the case was resolved. In addition, the median time it took for the cases with dispositions to be resolved was over two months. Timeliness is important because the CBAs require the State to act promptly to impose discipline within a reasonable time of the offense.

### Types of Resolution of Misconduct Cases

Once an investigation is completed, the investigation report is forwarded to the AA or designee for a decision on the next step. Often, but not always, DHR schedules a "staffing" meeting if the AA and DHR believe that it would be beneficial. Participants in staffing meetings are the AA and/or designee, DHR field operations staff, the investigator, and legal representation.<sup>30</sup>

Staffing meetings, when held, are used to discuss the results of the investigation as well as actions to be taken. The various actions that the AA and designees may take (with the assistance of DHR) are to (1) determine that the allegation is unsubstantiated, (2) decide that the employee should

<sup>29</sup> *Disciplinary Action and Corrective Action* (Personnel Policy Number 8.0, March 1, 1996).

<sup>30</sup> Legal representation can consist of the department's general counsel, DHR's legal unit, and/or the Office of the Attorney General.

receive supervisory feedback, (3) decide that the employee should be disciplined, or (4) negotiate a stipulated agreement.

### Unsubstantiated Allegation

The State's November 2016 revision to its investigation policy requires the appointing authority or designee to notify the subject of the investigation when the investigation has concluded.<sup>31</sup>

### Supervisory Feedback

This is not considered to be a disciplinary action but serves to put the employee on notice that the misconduct behavior was inappropriate and that further behavior of the same or similar nature may result in disciplinary action.

### Discipline

According to the disciplinary action article in the CBAs and the State's discipline policy, the State will (1) apply discipline with a view towards uniformity and consistency, and (2) impose a procedure of progressive discipline. The order of progressive discipline is oral reprimand, written reprimand, unpaid suspension, demotion (optional),<sup>32</sup> and dismissal. The CBAs and State discipline policy also acknowledge that there are circumstances in which progressive discipline may be bypassed or applied for an aggregate of dissimilar offenses. Employees can grieve the issuance of discipline in accordance with the CBAs and the State's grievance procedure.

A set of due process procedures is triggered if the State is considering suspending, demoting, or dismissing an employee.<sup>33</sup> According to DHR training materials, these procedures include issuing a letter to the employee that informs him or her that the State is considering disciplinary action up to and including suspension or dismissal; notifies the employee of the right to representation; documents the relevant policies, provisions, and statutes; and summarizes the investigation and evidence—this is called a “Loudermill”<sup>34</sup> letter. The letter also offers the employee the opportunity to respond in writing or to hold a “Loudermill meeting” with the AA or designee to respond to the allegations.<sup>35</sup> A 12-factor analysis is written and signed by the AA or designee after this meeting and documents the decision as to whether to impose discipline and, if so, what level of discipline to impose. The factors are

<sup>31</sup> This requirement was not in the prior version of this policy.

<sup>32</sup> The CBAs allow, but do not require, the State to demote an employee when implementing progressive discipline.

<sup>33</sup> As of March 2015, DHR guidance is that the due process procedures should be utilized for *any* unpaid suspension. Prior to this change, only suspensions above five days triggered due process procedures.

<sup>34</sup> The term “Loudermill” is derived from a U.S. Supreme Court case, *Cleveland Board of Education v. Loudermill* (470 U.S. 532, 1985).

<sup>35</sup> The purpose of this meeting is to give employees the opportunity to disagree with the employer's version of facts, identify witnesses who support the defense, identify mitigating circumstances, and offer any other arguments that may be appropriate.



based on case law and include considerations like the nature and seriousness of the offense, the employee's past discipline, and consistency with penalties in the same or similar types of cases (see Appendix III for the complete list).

### Stipulated Agreement

This is a negotiated settlement between the State and employee and reflects an agreement to forgo due process procedures and the grievance process. Agreements pertaining to misconduct can state that it does not constitute an admission of fact, wrongdoing, contractual interpretation, or violation by either party.<sup>36</sup> According to DHR training materials, a stipulated agreement is often a favorable resolution for both parties because there is a certainty of outcome, it is non-precedent setting, and allows creativity of outcome.

At times the resolution of a case is not made by the AA or designee, such as when the employee voluntarily resigns or retires before the process has been completed.

The State's internal control standards emphasize the importance of documenting critical decisions and events as well as documenting policies and procedures.<sup>37</sup> According to the standards, by recording information of critical events, management creates an organizational history that can serve as justification of subsequent actions and decisions. In addition, written policies and procedures set forth the fundamental framework and underlying methods and processes employees rely on to do their jobs. Without this framework of understanding by employees, conflict can occur, poor decisions can be made, serious harm to an organization's reputation can be done, and the efficiency and effectiveness of operations adversely affected.

The State's process for reaching decisions on employee misconduct cases can make it difficult to tell (1) who is making the decisions and when, (2) the rationale for the decision to impose a particular type of discipline, and (3) how progressive discipline is being applied. In particular, no written record is kept of the staffing meetings. The lack of a record of these meetings means that the decisionmaker and basis for discipline decisions may not be documented. For example, in seven of the 17<sup>38</sup> applicable AOT test cases, the person who executed the disposition (e.g., signed the written reprimand, issued the supervisory feedback, or signed the notification that the investigation was closed without further action), was not an appointing

<sup>36</sup> This statement was included in each of the nine stipulated agreements executed in the test cases reviewed. Of the nine stipulated agreements, (1) four stated that the disposition in the agreement constituted discipline (e.g., a disciplinary suspension), (2) five indicated that a final discipline decision had not been made, and (3) one stated that it was a last and final warning for the particular type of misconduct (inappropriate use of a law enforcement database). Three did not have language related to the previous three points.

<sup>37</sup> *Internal Control Standards: A Guide for Managers* (State of Vermont Department of Finance and Management).

<sup>38</sup> In one case there was no documentation of the department's disposition except for the DHR IU SharePoint® record. See Table 3 footnote c.

authority, and there was no record of whether or to whom this authority had been delegated. An AOT AA explained that only designated managers, such as district administrators, have the authority to sign disciplinary notices, such as reprimands, but this authority was not on AOT's delegation form. This lack of an explicit delegation combined with no record of staffing meetings meant we could not tell whether the managers who executed the discipline in the seven cases who were not AAs had made the decision or simply executed it.

In addition, under case law, each disciplinary action is considered in the context of the 12 factors and, according to DHR training documents, it is helpful for employers to take them into consideration before a disciplinary action is imposed. DHR and department officials told us that the 12 factors are considered and discussed when considering imposing discipline, but there was not always documentation of how the factors were applied. In the 25 cases reviewed in which discipline was imposed:

- A written, approved 12-factor analysis was documented in 6 cases.
- A 12-factor analysis was drafted, but not approved in one case.
- There was no documentation that a 12-factor analysis was completed for seven cases involving suspensions, demotions, or terminations. Since March 2015, DHR's guidance has been that 12-factor analyses should be issued in all such discipline cases. Of these seven, three were issued after March 2015.
- There was no documentation that a 12-factor analysis was completed in 11 cases involving oral or written reprimands. According to the HR director, the document of record for lower level discipline actions is the written feedback or written reprimand itself. These 11 cases had letters imposing the reprimand that explained the nature and seriousness of the offense. However, the letters generally did not address the other 12-factor elements (e.g., the consistency of the penalty with others that committed the same or similar offense). Accordingly, they did not support whether and how the factors were considered in deciding on the specific discipline.

Another area in which documentation was sometimes lacking was how progressive discipline was applied, which requires knowledge of an employee's disciplinary history. Specifically, there was no reliable central source to determine whether an employee had been the subject of previous disciplinary action or had signed a stipulated agreement for prior misconduct that states that it is the employee's "last chance."

According to DHR training materials, the SharePoint® sites maintained by the AHS<sup>39</sup> and DHR investigations units are the sources that should be used to collect data on prior comparable conduct and discipline. However, the sites do not include all misconduct cases (see Other Matters section of this report and our companion report). Other sources of this information—the discipline module in the State’s human resources system and employees’ personnel files—were also incomplete. For example, according to the DHR director of field operations, the discipline module is not consistently used and does not include stipulated agreements. There were also cases in which employees’ personnel files did not include the disciplinary action.<sup>40</sup> Without assurance that an employee’s discipline history is complete, the AA or designee risks making an inappropriate decision.

We came across a useful practice in our AHS employee misconduct audit that could help other departments. In the Department of Corrections misconduct cases, DHR staff provided attendees of staffing meetings with a written personnel summary of the employee, including past discipline. According to Corrections officials, this is a useful document that helps them make decisions.

Table 3 summarizes the outcomes in the 70 cases in our review. The alleged misconduct was unsubstantiated in 11 cases (16 percent) cases. Discipline was imposed for substantiated allegations in 25 cases (36 percent of total test cases). The State negotiated stipulated agreements with the employee in nine cases (13 percent). The settlements in the nine stipulated agreements varied, including resignation, suspensions, and “last chance” warnings for similar misconduct (some stipulations had a combination of such outcomes).

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<sup>39</sup> As the largest organization in state government, AHS has its own investigations unit and SharePoint® site.

<sup>40</sup> At the employee’s request, letters of reprimand that are more than two years old and in which no other discipline has resulted shall be removed. Suspensions of three or fewer days shall be removed at the employee’s request after five years if the employee has no other discipline in that time period. In comments on a draft of this report, the DHR commissioner stated that DHR is prevented from considering an employee’s past discipline once it is removed from the official personnel file as a result of the applicable CBA.

**Table 3: Summary of Outcomes of 70 Test Cases in 2014-2016, by Organization**

Disposition Type	Number of Test Cases					
	AOT <sup>a</sup>	BGS	DOL	DPS <sup>b</sup>	VVH	Total
<b>Disposition Taken by or Negotiated by the State:</b>						
Unsubstantiated misconduct	5 <sup>c</sup>	1	0	2	3	11
Supervisory feedback	3	1	2	0	0	6
Stipulated agreements	3	1	0	3	2	9
Disciplinary action:						
Oral reprimand	1	0	1	0	1	3
Written reprimand	2	1	2	3	0	8
Suspension	1 <sup>d</sup>	1	2	0	0	4
Demotion	1	1	0	0	0	2
Termination	1	3	0	1	3	8
<b>Subtotal</b>	<b>17</b>	<b>9</b>	<b>7</b>	<b>9</b>	<b>9</b>	<b>51</b>
Voluntary resignation or retirement by employee while process was on-going	1	0	2	1	3	7
Hardship reduction in force requested by employee	2	0	0	0	0	2
Unfulfilled disposition decision	0	0	0	0	1	1
No evidence of disposition decision	0	1	1	0	7	9
<b>Total</b>	<b>20</b>	<b>10</b>	<b>10</b>	<b>10</b>	<b>20</b>	<b>70</b>

<sup>a</sup> Does not include DMV.

<sup>b</sup> Does not include sworn officers.

<sup>c</sup> In one case the DHR IU SharePoint® record indicates that the results of the staffing meeting was that the alleged misconduct was unfounded. However, the HR manager could not produce evidence of who made this decision.

<sup>d</sup> This case had multiple subjects; two received suspensions and one received an oral reprimand. Only the highest level of discipline (suspension) is counted in this table as a single case.

In 10 cases (14 percent), there was no evidence that the AA or designee had decided on a disposition or the disposition had not been carried out. For example:

- In seven VVH cases, neither VVH nor DHR could produce documents to support what, if any, decision had been made. Additionally, in 2014, a VVH employee was alleged to have verbally and mentally abused a patient. A department director investigated and decided to issue an oral reprimand. VVH could not produce a record of the oral reprimand being issued to the employee.
- In 2014, a BGS staff member was alleged to have violated policy and introduced contraband into a secure area of a correctional facility. The HR administrator completed the investigation into these charges in approximately six months, but there was no record of how this case was

resolved. Neither BGS nor DHR officials could account for the lack of disposition in this case.

## Time to Resolve Misconduct Cases

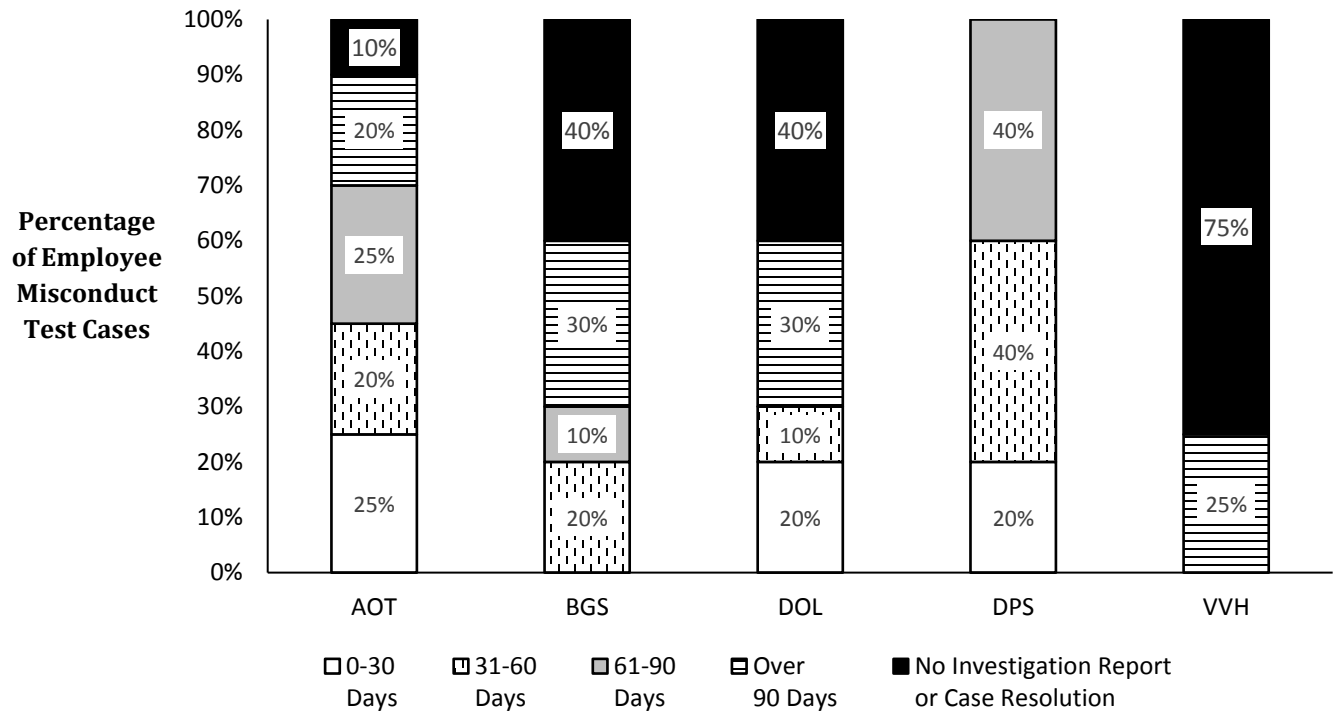
There is no specific timeframe in the CBA or personnel policies in which the State needs to reach a disposition in a case, but the January 2015 DHR employee misconduct protocol states that the targeted completion date of cases post-investigation is 30 calendar days.

The median time between the completion of the investigation and the final disposition decision or employee resignation was 73 days for the test cases in our scope.<sup>41</sup> There were significant differences in the median number of days to final disposition in the five departments for the cases we reviewed—67 days for AOT, 87 days for BGS, 63 days for DOL, 41 days for DPS, and 261 days for VVH. However, broad conclusions cannot be drawn from these numbers because the sample was judgmentally selected.

Figure 2 shows the percentage of the test cases in 30-day increments from the investigation completion date to the final disposition decision date for each department. Only 13 percent of cases were resolved within the 30-day target.

<sup>41</sup> For this calculation, we did not include the 25 test cases in which there was no disposition decision or the disposition was unfulfilled and/or the date that the investigation was closed was unknown.

**Figure 2: Days Between Investigation Completion to Final Disposition Date Shown as Percentage of 30-day Increments for AOT<sup>a</sup>, BGS, DOL, DPS<sup>b</sup>, and VVH Test Cases<sup>c, d</sup>**



<sup>a</sup> AOT does not include DMV cases.

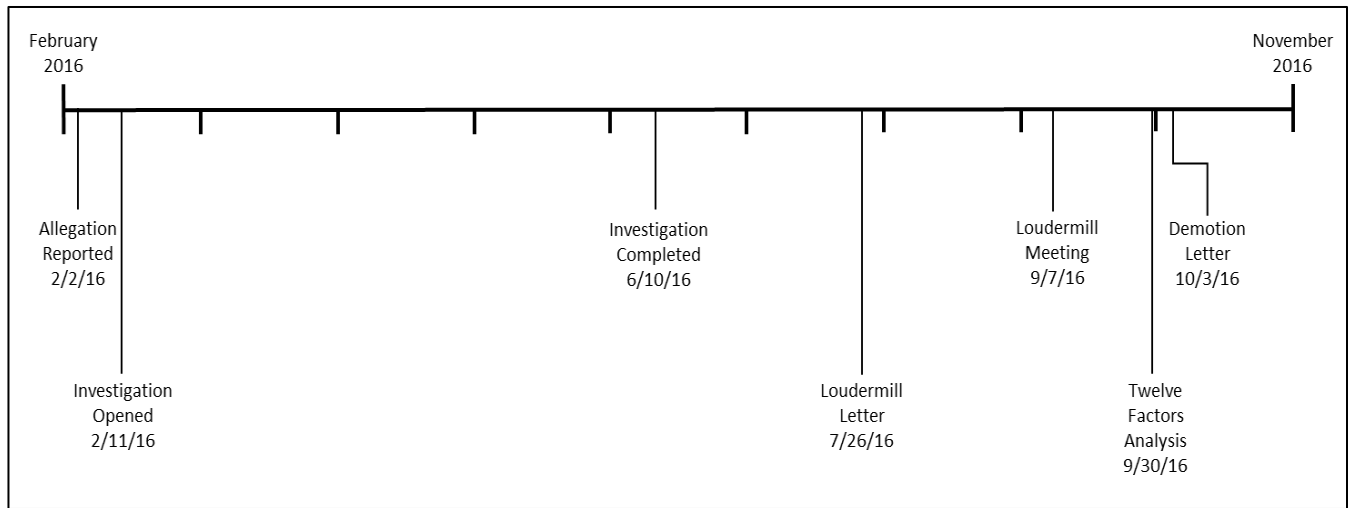
<sup>b</sup> DPS does not include cases with sworn officers.

<sup>c</sup> Regarding the segment entitled “No Investigation Report or Case Resolution,” there were 20 cases with no investigation reports and 12 cases with no disposition dates (seven were missing both).

<sup>d</sup> BGS did not have any cases in the 0-30 day category. DOL did not have any cases in the 61-90 day category. DPS did not have any cases in the over 90-day category and the No Investigation Report or Case Resolution category. VVH did not have any cases less than or equal to 90 days.

While we did not determine why so many of the disposition decisions took so long, we note that about two thirds of the 15 cases that took over 90 days to resolve included due process procedures (e.g., a Loudermill letter was issued). Due process procedures can take a considerable amount of time. To illustrate, Figure 3 shows the timeline for a case that went through each of the due process procedures and ultimately resulted in a demotion about four months after the investigation report was issued.

**Figure 3: Example of the Timeline of an Employee Misconduct Case**



It is especially important that dispositions that result in discipline be decided in a timely manner because the CBAs require that the State act promptly to impose discipline within a reasonable time of the offense. According to state policy, the AA must be reasonably diligent in taking disciplinary action, which DHR also considers to be good labor relations practice. The longer it takes to render a disposition decision, the higher the risk that disciplinary action taken by the State could be overturned. According to the VLRB, it has precluded management from disciplining employees for alleged offenses when it has found that the CBA provision for prompt action was violated. Of the cases that resulted in discipline, the median time it took to complete the entire case (date of notification of the allegation to final disposition) was 122 calendar days,<sup>42</sup> or about four months (the range was 20 days to 533 days<sup>43</sup>). The majority of this time is attributed to the length of time between the investigation date and the final disposition date.

<sup>42</sup> We performed this calculation on 25 cases that resulted in discipline. In those cases in which the date of the allegation was unavailable, we used the date the investigation was opened.

<sup>43</sup> The case that took 20 days to resolve was a DOL case involving unprofessional behavior that resulted in a written reprimand. The case that took 533 days to resolve was a VVH case and involved tardiness that resulted in a termination.

## Other Matters

During the course of our audit we came across other issues related to the completeness and accuracy of the records in the DHR IU SharePoint® site and the performance measures related to misconduct cases.

### SharePoint® Data

The DHR IU SharePoint® site did not contain all the investigations conducted outside of DHR, and many of the records it did contain had errors in various fields. In particular, the VVH had 179 of 188 cases outside of SharePoint®.<sup>44</sup> In addition, BGS, DOL, and DPS each had at least one case outside of SharePoint®.<sup>45</sup> Regarding AOT, certain employees can be subject to discipline for misconduct if they fail to comply with the “Special Snow Season Status” article in the non-management bargaining unit’s CBA.<sup>46</sup> However, these cases were not entered into SharePoint®, and we could not determine how many of these cases occurred in our scope period. Lastly, of the 54 RFD cases for the five organizations in our scope, 31 did not have a corresponding SharePoint® case (29 were from the VVH).

Even those records of misconduct cases that were listed in the DHR IU SharePoint® site were not sufficiently reliable for purposes of our audit objectives. There were records with logical anomalies within the 284 non-AHS cases. For example, there were six cases in which the case disposition field was blank but the case status was listed as closed. In addition, 31 of the 55<sup>47</sup> cases reviewed (56 percent) had one or more errors (inaccuracies or blanks) in fields such as investigation open date, investigator, and case disposition.

The DHR IU site does not have a user manual that describes the fields in the site and the information that is expected to be contained in these fields. This resulted in inconsistencies. For example, in some records the case disposition field contained how the case was resolved (e.g., resignation, written reprimand) while in other records the field was blank.

<sup>44</sup> The VVH did not have access to the DHR IU SharePoint® site until 2017.

<sup>45</sup> The former DOL commissioner told us that during 2014-2016, 24 misconduct cases were handled outside of the DHR IU and not entered into SharePoint®. However, DOL officials could only find documentation of one of those cases.

<sup>46</sup> Article 68 of the non-management bargaining unit CBA.

<sup>47</sup> Fifteen of the VVH cases reviewed did not have a case opened in the DHR IU SharePoint® site.



## Performance Measures

According to the January 2015 protocol, investigations should be completed within 60 calendar days. DHR tracks and reports the percentage of employee misconduct investigations conducted by the IU that were completed within 90 days, which is inconsistent with the protocol. According to DHR officials, 90 days allows them to account for weekends, holidays, annual leave, sick leave, and training. Nevertheless, we believe the performance measure should be consistent with the protocol. In addition, DHR does not track nor report on the length of investigations completed by others outside of the DHR IU. Therefore, the reported measure does not reflect the length of time all investigations take.

According to the January 2015 protocol, a disposition for a case should be reached within 30 calendar days from the completion of the investigation. DHR does not track the extent to which it meets this target.

Even if DHR establishes performance measures pertaining to the disposition of all misconduct cases, until the state of reliability of the DHR IU SharePoint® site as discussed in the previous section is improved, we lack confidence that statistics compiled from this site would be correct.

## Conclusions

Addressing alleged employee misconduct is a serious and sometimes complicated matter that requires the coordination of multiple state organizations. Decisions on how to handle misconduct cases can have major consequences for both the employee and the State. Employees can lose their jobs, be demoted, or be suspended without pay, and the State may pay employees who are not working (RFD status). Some of these State costs may have been borne unnecessarily, which can be mitigated by implementing additional internal controls.

Parts of the process for handling employee misconduct lacked documentation, such as how allegations not resulting in investigations were handled, the completion of investigation reports, as well as the basis for some dispositions. Moreover, there was no reliable central source to determine whether an employee had been the subject of previous disciplinary action or had signed a stipulated agreement that states that it is the employee's "last chance." Since an employee's prior disciplinary history is a factor in deciding whether to issue a disciplinary action and, if so, what type of action, the lack of a central source for this data could adversely affect the appointing authority or designee's decision. In addition, it is important that investigations and dispositions be completed in a timely manner. Only about

half of the investigations and an eighth of the decisions on the disposition of the cases we reviewed were completed within targeted timeframes of 60 and 30 days, respectively. There are external and internal factors that may make these targets unreachable in certain circumstances (e.g., due process procedures). Nevertheless, the lack of overall performance measures that are tracked pertaining to the length of time to complete employee misconduct investigations or the disposition of these cases suggests that not enough attention is being given to this area.

## Recommendations

We make the recommendations to DHR and the five organizations in our scope in Tables 4-9.

**Table 4: Recommendations to the Commissioner of the Department of Human Resources**

Recommendation	Report Pages	Issue
1. Modify the DHR IU SharePoint® system or develop a new system to be a repository of allegations, investigations, and resolutions of all employee misconduct decisions, and include edits to help ensure that records are complete and accurate.	14, 30	It was not possible to evaluate DHR's decisions on whether and by whom investigations of allegations of misconduct were to be conducted because DHR did not record or log all allegations, only those for which investigations were conducted. In addition, the DHR IU SharePoint® site did not include all employee misconduct cases. The site also contained logical anomalies and records that contained inaccuracies and blank fields.
2. Develop and implement a procedure for ensuring that extensions of employees' RFD status beyond 30 workdays is approved, and ensure that the subject employee is notified in writing of such extensions.	16-17	Our companion audit of AHS misconduct cases found 17 instances in which an employee was maintained in RFD status well beyond the date the investigation had been completed. There were two such cases in the scope of this report. In these cases, the State paid the salaries and benefits of non-working employees after the investigation was completed even though it did not appear that the department was considering dismissing the employee. In addition, extension letters were not sent to employees on RFD over 30 days in at least 12 cases.
3. Develop a report to send to AAs periodically with a list of all employees in RFD status and their duration in this status.	16-17	See recommendation 2.

Recommendation	Report Pages	Issue
4. Require that the assigned investigator, whether at the DHR IU, department, or DHR field operations unit, summarize the procedures conducted and information collected on all employee misconduct cases. This could be an investigation report, memorandum, or other summary documentation.	18-19	Investigations into alleged misconduct of employees were not always documented by the organizations in our scope. Without reports documenting the investigative steps and findings of an investigation, the State may have a difficult time defending how cases were resolved. In addition, the State is not in a position to determine if investigations were complete and thorough.
5. Require that AAs or designees document their rationale (e.g., analysis of the 12-factors) for the decision to impose a particular type of discipline.	23-24	There was no record of the staffing meetings. In addition, under case law, each disciplinary action is considered in the context of the 12 factors and, according to DHR training documents, it is helpful for employers to take them into consideration before a disciplinary action is imposed. DHR and department officials told us that the 12 factors are considered and discussed when considering imposing discipline, but there was not always documentation of how the factors were applied.
6. Develop a mechanism to maintain a comprehensive and easily accessible record of all discipline and stipulated agreements for all employees, and make this information available to AAs and designees.	24	There was no reliable central source to determine whether an employee had been the subject of previous disciplinary action or had signed a stipulated agreement that states that it is the employee's "last chance."
7. Consider requiring DHR staff to provide a written summary of the subject employee's discipline history to staffing meeting attendees.	25	In Department of Corrections misconduct cases, DHR staff provided attendees of staffing meetings with a written personnel summary of the employee, including past discipline. According to Corrections officials, this is a useful document that helps them make decisions.
8. Develop a user manual for the DHR IU SharePoint® system that includes descriptions of each field and expected values.	30	DHR does not have a user manual for the DHR IU SharePoint® site that describes the fields in the site and the values that are expected to be contained in these fields.
9. Develop a target for when investigations are expected to be completed regardless of the organization of the investigator, and track the extent to which this target is being met.	19, 31	According to the January 2015 protocol, the investigators in the DHR IU are to make an effort to complete all interviews and forward a final report to the HR manager within 60 days. This document does not set standards for timeliness for investigations conducted by department management or DHR field operations staff. In addition, DHR does not track nor report on the length of investigations completed by others outside of the DHR IU. Therefore, the reported measure does not reflect the length of time all investigations take.

Recommendation	Report Pages	Issue
10. Develop a target for when AAs or designees are expected to finalize the disposition of a case, and track the extent to which this target is being met. There could be separate targets depending on the type of expected outcome (e.g., unsubstantiated, suspensions, or stipulated agreements).	31	According to the January 2015 protocol, a disposition for a case should be reached within 30 calendar days from the completion of the investigation. DHR does not track the extent to which it meets this target.

**Table 5: Recommendations to the Secretary of the Agency of Transportation**

Recommendation	Report Pages	Issue
1. Develop a process in conjunction with DHR to document the decisionmaker for each disposition of an employee misconduct case, when the decision was made, and confirmation that the disposition was carried out.	23	There is no written record of the staffing meetings. In over a third of the test cases in AOT, the person who executed the disposition (e.g., signed the written reprimand, issued the supervisory feedback, or signed the notification that the investigation was closed without further action), was not an appointing authority or designee. Since there was no record of the staffing meetings, we could not tell whether these individuals made the decision or simply executed the decision. In addition, there were misconduct cases in which there was no evidence that the AA or designee had decided on a disposition of the case or the disposition had not been carried out.
2. When considering imposing discipline in an employee misconduct case and in conjunction with DHR, document the rationale used in the decision-making process, including how the 12 factors were applied.	23-24	DHR and department officials told us that the 12 factors are considered and discussed when considering imposing discipline, but there was not always documentation of how the factors were applied.
3. Develop a process in conjunction with DHR to notify DHR of all employee misconduct allegations and resolutions.	30	Each organization in the scope of this audit had at least one investigation that was not included in the DHR IU SharePoint® site.

**Table 6: Recommendations to the Commissioner of the Department of Buildings and General Services**

<b>Recommendation</b>	<b>Report Pages</b>	<b>Issue</b>
1. Develop a process in conjunction with DHR to document the decisionmaker for each disposition of an employee misconduct case, when the decision was made, and confirmation that the disposition was carried out.	23	There is no written record of the staffing meetings. The lack of a record of these meetings means that the decisionmaker and basis for discipline decisions may not be documented. In addition, there were misconduct cases in which there was no evidence that the AA or designee had decided on a disposition of the case or the disposition had not been carried out.
2. When considering imposing discipline in an employee misconduct case and in conjunction with DHR, document the rationale used in the decision-making process, including how the 12 factors were applied.	23-24	DHR and department officials told us that the 12 factors are considered and discussed when considering imposing discipline, but there was not always documentation of how the factors were applied.
3. Develop a process in conjunction with DHR to notify DHR of all employee misconduct allegations and resolutions.	30	Each organization in the scope of this audit had at least one investigation that was not included in the DHR IU SharePoint® site.

**Table 7: Recommendations to the Commissioner of the Department of Labor**

<b>Recommendation</b>	<b>Report Pages</b>	<b>Issue</b>
1. Develop a process in conjunction with DHR to document the decisionmaker for each disposition of an employee misconduct case, when the decision was made, and confirmation that the disposition was carried out.	23	There is no written record of the staffing meetings. The lack of a record of these meetings means that the decisionmaker and basis for discipline decisions may not be documented. In addition, there were misconduct cases in which there was no evidence that the AA or designee had decided on a disposition of the case or the disposition had not been carried out.
2. When considering imposing discipline in an employee misconduct case and in conjunction with DHR, document the rationale used in the decision-making process, including how the 12 factors were applied.	23-24	DHR and department officials told us that the 12 factors are considered and discussed when considering imposing discipline, but there was not always documentation of how the factors were applied.
3. Develop a process in conjunction with DHR to notify DHR of all employee misconduct allegations and resolutions.	30	Each organization in the scope of this audit had at least one investigation that was not included in the DHR IU SharePoint® site.

**Table 8: Recommendations to the Commissioner of the Department of Public Safety**

Recommendation	Report Pages	Issue
1. Develop a process in conjunction with DHR to document the decisionmaker for each disposition of an employee misconduct case, when the decision was made, and confirmation that the disposition was carried out.	23	There is no written record of the staffing meetings. The lack of a record of these meetings means that the decisionmaker and basis for discipline decisions may not be documented. In addition, there were misconduct cases in which there was no evidence that the AA or designee had decided on a disposition of the case or the disposition had not been carried out.
2. When considering imposing discipline in an employee misconduct case and in conjunction with DHR, document the rationale used in the decision-making process, including how the 12 factors were applied.	23-24	DHR and department officials told us that the 12 factors are considered and discussed when considering imposing discipline, but there was not always documentation of how the factors were applied.
3. Develop a process in conjunction with DHR to notify DHR of all employee misconduct allegations and resolutions.	30	Each organization in the scope of this audit had at least one investigation that was not included in the DHR IU SharePoint® site.

**Table 9: Recommendations to the Administrator of the Vermont Veterans' Home**

Recommendation	Report Pages	Issue
1. Develop a process in conjunction with DHR to document the decisionmaker for each disposition of an employee misconduct case, when the decision was made, and confirmation that the disposition was carried out.	23	There is no written record of the staffing meetings. The lack of a record of these meetings means that the decisionmaker and basis for discipline decisions may not be documented. In addition, there were misconduct cases in which there was no evidence that the AA or designee had decided on a disposition of the case or the disposition had not been carried out.
2. When considering imposing discipline in an employee misconduct case and in conjunction with DHR, document the rationale used in the decision-making process, including how the 12 factors were applied.	23-24	DHR and department officials told us that the 12 factors are considered and discussed when considering imposing discipline, but there was not always documentation of how the factors were applied.
3. Develop a process in conjunction with DHR to notify DHR of all employee misconduct allegations and resolutions.	30	Each organization in the scope of this audit had at least one investigation that was not included in the DHR IU SharePoint® site.

## Management's Comments and Our Evaluation

We sent a draft of this report to DHR and the organizations in our scope for comment. On June 6, 2017, the commissioner for the Department of Human Resources provided a response to the draft that stated that the comments were coordinated with the organizations in our scope. The commissioner's response is reprinted in Appendix IV along with our evaluation of these comments.

The commissioner's response stated that we had raised some important issues that will be carefully reviewed and considered. However, in general, her comments on specific elements of the report indicated that DHR does not plan to implement our recommendations. In summary, the major objections to our recommendations were that they (1) were not required by State statute, personnel policies, the CBAs, and decisions by the VLRB and the courts (called "guiding authorities" in the commissioner's response) and (2) called for additional documentation of decisions that DHR considered burdensome and unnecessary. We disagree with the commissioner's comments. Specifically, while the State's internal processes should be informed by, and consistent with, the sources cited by the commissioner, she cited no evidence that the State is prohibited from developing practices to document their critical decisions and significant events, as called for in the State's own internal control standards.

The commissioner also commented that our report suggested new standards not required by the guiding authorities. We disagree with this characterization. We utilized as criteria the guiding authorities cited by the commissioner as well as DHR's business practices as contained in: (1) the DHR protocol for handling employee misconduct, (2) DHR training documents, (3) communications with DHR management clarifying the State's practices, and (4) timeliness targets or benchmarks set by DHR. Thus, we did not suggest new standards, rather we utilized operational practices that DHR had established itself.

These operational practices are important supplements to the guiding authorities cited by the commissioner, as these materials can go beyond the requirements in the State's personnel policies and CBAs. For example, the personnel policies pertaining to due process requirements (e.g., the Loudermill process)<sup>48</sup> and the CBAs require that these due process procedures be implemented when contemplating dismissing an employee. However, in the March 2015 training materials, DHR stated that the

<sup>48</sup> *Disciplinary Action and Corrective Action* (Personnel Policy Number 8.0, March 1, 1996) and *Due Process Requirements (Loudermill Process)* (Personnel Policy Number 8.1, March 1, 1996).

Loudermill process should be used when contemplating a suspension or a demotion, as well.

The intent of our recommendations is to improve the State's operational practices for handling alleged employee misconduct. Accordingly, we continue to believe that our recommendations should be implemented. See Appendix IV for more detail on our evaluation of the commissioner's comments.



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## Appendix I

### Scope and Methodology

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To address all objectives, we reviewed a variety of criteria, including the:

- State Employees Labor Relations Act
- Collective bargaining agreements between the State and the VSEA for the Non-management and Supervisory bargaining units
- State Personnel Policy Number 2.3, *Rules and Regulations for Personnel Administration*
- State Personnel Policy Number 3.1, *Sexual Harassment*
- State Personnel Policy Number 3.3, *Discrimination Complaints*
- State Personnel Policy Number 5.6, *Employee Conduct*
- State Personnel Policy Number 8.0, *Disciplinary Action and Corrective Action*
- State Personnel Policy Number 8.1, *Due Process Requirements (Loudermill Process)*
- State Personnel Policy Number 9.1, *Immediate Dismissal*
- State Personnel Policy Number 10.0, *Grievance Procedure*
- State Personnel Policy Number 17.0, *Employment Related Investigations* (both the March 1996 and November 2016 versions)
- DHR Field Operations Protocol for Employee Misconduct Investigations (January 2015)

We also discussed the employee allegation, investigation, and discipline process with various DHR officials, including the HR director, director of field operations, and the HR managers for AOT, BGS, DOL, and DPS and the HR Administrator for VVH. In addition, we held discussions with the manager of the DHR IU, and appointing authorities at AOT, DOL, and VVH. Lastly, we reviewed summaries of cases adjudicated by the Vermont Labor Relations Board.

To obtain information on the investigations opened between January 1, 2014 to December 31, 2016, we downloaded summary-level files from the DHR investigations unit's SharePoint® site. We performed procedures to confirm the validity of the download and assess the reliability of the data in the site.

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## Appendix I

### Scope and Methodology

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We determined that the SharePoint® system was not reliable for purposes of our audit objectives because it was incomplete and contained inaccuracies. Because this is the only system that tracked employee misconduct investigations pertaining to the organizations in our scope, we chose to use the system only for limited purposes, but not to draw broad conclusions using only the data from the system.

Once we had a list of misconduct investigations from the SharePoint® site, we summarized this list by organization and chose to perform detailed testing at AOT (except DMV), BGS, DOL, and DPS (except sworn officers) because they had the higher number of misconduct investigations identified in the SharePoint® site. We chose VVH because it appeared that not all of their cases were in the SharePoint® site.

With respect to Objective 1, we also obtained a file from the State's payroll system of all employees in RFD status between 2014 and 2016, the days and hours that they were on this status, and their pay rate.<sup>49</sup> We removed the cases from this file that were not applicable to our audit scope (e.g., 2013 cases, non-misconduct cases) and traced the remainder to our files of the investigation records in the DHR investigations unit's SharePoint® site.

Our work for Objectives 2 and 3 primarily related to choosing and reviewing 70 employee misconduct cases (20 for AOT, 10 for BGS, 10 for DOL, 10 for DPS, and 20 for VVH). We judgmentally chose these cases to obtain a mixture of (1) investigations performed by the DHR IU, DHR field operations, and the departments, (2) case dispositions, (3) year, and (4) misconduct alleged. Of the 20 cases from VVH, 5 were chosen from the DHR IU SharePoint® system site using the above criteria. The remaining 15 were chosen randomly from a list of 179 employee ID numbers of employees who received investigation letters. This list was provided to us by the DHR field operations employees assigned to the VVH. There was a distribution of cases across each year of our scope (24 cases opened in 2014, 29 in 2015, and 17 in 2016). Since these cases were judgmentally chosen, the results cannot be projected to the universe of misconduct cases.

For each of the cases, we obtained the detailed records from the SharePoint® site. We also obtained copies of the (1) allegations, (2) investigation reports, (3) RFD letters, (4) Loudermill letters, (5) 12-factor analyses, and (6) disposition documentation (e.g., suspension letters, stipulated agreements). We made inquiries of the relevant HR manager and department staff, including appointing authorities or designees, about these cases. The appointing authorities or designees included a commissioner, deputy commissioners, and division directors. We also confirmed that dispositions

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<sup>49</sup> We did not assess the reliability of this data.

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## Appendix I

### Scope and Methodology

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involving discipline or stipulated agreements were in the employee's personnel file and that the action had been taken in the payroll system (e.g., if the employee had been suspended or dismissed).

We performed our audit work between November 2016 and May 2017 at the state office complex in Waterbury, various state offices in Montpelier, and the Vermont Veterans' Home in Bennington. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Appendix II Abbreviations

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AA	Appointing authority
AHS	Agency of Human Services
AOT	Agency of Transportation
BGS	Department of Buildings and General Services
CBA	Collective bargaining agreement
DHR	Department of Human Resources
DHR IU	Department of Human Resources Investigations Unit
DMV	Department of Motor Vehicles
DOL	Department of Labor
DPS	Department of Public Safety
GAGAS	Generally accepted government auditing standards
RFD	Temporary relief from duty
VLRB	Vermont Labor Relations Board
VSEA	Vermont State Employees' Association, Inc.
VVH	Vermont Veterans' Home

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## Appendix III

### 12-Factors Considered During Discipline Decisions

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Personnel Policy Number 8.0, *Disciplinary Action and Corrective Action* states that under case law, each disciplinary action is considered in the context of 12 factors, as follows.

1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
2. The employee's job level and type of employment including supervisory or fiduciary role, contacts with the public and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties.
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses.
7. Consistency of the penalty with any applicable agency table of penalties. (The State does not currently use any form of table of penalties.)
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
10. Potential for the employee's rehabilitation.
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Appendix IV  
Reprint of Management's Comments and SAO's Evaluation



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Agency of Administration

MEMORANDUM

**TO:** Doug Hoffer, State's Auditor  
**FROM:** Beth Fastiggi, DHR Commissioner. *BF*  
**DATE:** June 6, 2017  
**RE:** Comments to Draft Audit Report No 17-03 - State Employee Misconduct

Thank you for the opportunity to comment on your office's draft report regarding State employee misconduct investigation and disciplinary processes. You raise some important issues and they will be carefully reviewed and considered.

Please find below specific comments, which have been coordinated with the other Departments included in your draft report.

1. Guiding Authorities. The requirements of the disciplinary process are governed by State statutes (3 V.S.A. § 926; 3 V.S.A. § 1003), Personnel Policies issued by the Secretary of Administration, agreements collectively bargained between management and labor unions (CBAs), and decisions of the Vermont Labor Relations Board (VLRB) and Vermont courts. These authorities are hereinafter collectively referred to as "the guiding authorities." While this process as managed by the State could benefit from some of the practices which were identified in the draft reports, current processes, all of which may be grieved, generally result in actions that are upheld by the Vermont Labor Relations Board (VLRB) and the Vermont courts, who have the subject matter expertise and legal authority to judge them.

2. Audit Standards: Generally accepted audit practice is to measure an organization against standards and requirements set by the guiding authorities or recognized best practices (for example, Federal procedures developed in managing the Federal civil service, applying similar laws.) However, throughout this report, the Auditor has suggested new standards which are not required by the guiding authorities or compared to recognized best practices. The Auditor has also utilized internally-created informal goals that actually exceed the standards for timeliness and documentation imposed by guiding authorities, in a manner never intended when the goals were created. For example, one draft report states "the data systems used to track misconduct investigations were not sufficiently complete and reliable *for the purposes of our objectives*"

This characterization of auditing standards is incorrect. See comment 1 on page 49.

## Appendix IV Reprint of Management’s Comments and SAO’s Evaluation

(emphasis added), rather than finding that the agencies did not meet the requirements set by the guiding authorities.

3. Relief from Duty (RFD): The State seeks to minimize the amount of time employees are placed in this paid leave status while disciplinary action is pending. The State does not have the option of placing classified employees on unpaid leave, and there are many circumstance in which it is in the State’s best interest to remove the employee from the workplace pending potential disciplinary action. The length of time an employee is on RFD is often due to factors beyond the State’s control, for example an employee with access to vulnerable adults who is under criminal investigation for abuse may be on RFD to protect that vulnerable population until the criminal investigation is complete. Also, once an investigation is completed due process requirements must be followed prior to making a decision which may be prolonged by factors beyond the State’s control. Regardless of the level of discipline ultimately imposed, returning the employee to work while the decision is pending is not generally prudent and must be made on a case-by-case basis. DHR agrees that additional steps may be taken to ensure that employees are removed from RFD status as soon as possible. DHR already provides such guidance verbally on a case by case basis, as required due to the specifics of each case and expects to continue to use verbal guidance to communicate to the AAs.

4. Timeliness: DHR provides the following comments regarding the timeliness of the investigative and disciplinary processes.

The report states in part “...the lack of overall performance measures that are tracked pertaining to the length of time to complete employee misconduct investigations or the disposition of these cases suggests that not enough attention is being given to this area” and “investigations were not always completed timely.” However, the internally-established benchmarks (60 days for investigations, later adjusted for the DHRIU to 90 days, and 30-days for post-investigation decisions) are not an appropriate measure of “timeliness” as the term is customarily used in the context of employee discipline. The benchmarks were voluntarily adopted to assist the organizations in managing the processes, with the full knowledge that many situations would require more time. They are not imposed by any of the guiding authorities, who have not set rigid time standards due to the variations in circumstances that make such standards counterproductive. Rather, these bodies (the VLRB and Vermont courts) evaluate each case on its own facts to determine whether the State has been timely in imposing discipline. Rigid standards could potentially lead to rushed investigations and poor decision-making if strict time standards were imposed. Due process requirements, scheduling challenges with multiple parties including labor unions and other representatives, and settlement negotiations may all properly lengthen the disciplinary process and, as noted, many delays are outside the control of the investigator or decision-maker, such as an ongoing criminal investigation, or employee illness. VLRB decisions during the audit period show only one case in which the VLRB found State-imposed discipline untimely, and in that case the Vermont Supreme Court overturned the VLRB’s ruling and upheld the State’s action, finding no prejudice to the employee. Such results should be the measure of performance, rather than arbitrary time standards. Therefore, DHR supports informal benchmarks set internally to encourage forward movement of the disciplinary process, but not as a performance measure.

See comment 2 on page 49.

See comment 3 on page 50.

See comment 4 on page 50.

See comment 5 on page 50.

See comment 6 on page 50.

## Appendix IV Reprint of Management's Comments and SAO's Evaluation

See comment 7 on page 50.

5. Documentation: The report referred to documentation which was in some way "lacking," for example "Objective 1: Documentation Lacking on Decisions Related to Allegations," and "Objective 3: Decision-making Process for Resolving Misconduct Cases Often Lacked Documentation and Sometimes Took Months." However, most of the documentation considered "lacking" is not required by the guiding authorities, as is described in particular categories below.

- *SharePoint*: In the past few years DHR and AHS have made great improvements in record-keeping related to the investigatory and disciplinary process, above and beyond those which are required by the guiding authorities, in order to improve the disciplinary process for customers, employees, and HR practitioners. This includes the creation of investigations SharePoint sites that have grown to incorporate additional aspects of the misconduct process. This developmental process will continue with plans for a single misconduct database and DHR agrees that improving the completeness and accuracy of the database is an important goal. However, most of the recommended documentation requirements, some of which are explored in more detail below, are burdensome and unnecessary, and in some cases contrary to the efficient and proper functioning of the disciplinary process. While, as noted in the draft report, a minority of employees indicated concerns about State disciplinary processes in a survey, the courts and the VLRB have generally supported management actions in this sphere, indicating that additional documentation requirements are not necessary.

See comment 8 on page 50.

- *Method of Investigation*: All misconduct allegations involve unique facts and circumstances, and decisions about whether to investigate them must be flexible to reflect this complexity. For example, some allegations of sexual harassment, such as an unwelcome touching, may be severe, yet require a minimal and relatively simple investigation, more quickly and easily accomplished by HR personnel. Conversely, non-"priority" investigations may be complex and require more expertise. Overly specific policies for such complex processes are often counter-productive and must be approached with flexibility. DHR prefers its current approach to consider each allegation on a case-by-case basis and select the most appropriate manner of investigation based upon the circumstances present, but will continue to assess where more specificity can be brought into the process. Additionally, tracking all allegations that come to DHR's attention, even if not ultimately investigated, is an appropriate goal and one that DHR has in place, but there will always be a *de minimus* level that makes tracking an unnecessary burden.

See comment 9 on page 51.

- *Rationale for decision making*. At this point in time, DHR does not expect to implement the recommendations to require documentation for decisions related to investigation or the imposition of discipline beyond those currently required by the guiding authorities, but will continue to evaluate where additional documentation may be of value. For example, the Auditor recommends in all cases consideration of the "12 factors" must be documented which is not a requirement of the guiding authorities. DHR agrees the State should *consider* the "12 factors" when imposing discipline.<sup>1</sup> In serious disciplinary actions DHR has determined that the best

This misrepresents our recommendation. See comment 10 on page 51.

<sup>1</sup> From Personnel Policy 8.0: *The Twelve Factors*. Under the case law, each disciplinary action is considered in the context of twelve factors which are typically relevant to evaluating the appropriateness of a penalty. Since such factors will be used to evaluate the propriety of an action which is the subject of a grievance, it is helpful for the



## Appendix IV Reprint of Management's Comments and SAO's Evaluation

This misrepresents our recommendation. See comment 11 on page 51.

See comment 12 on page 51.

See comment 13 on page 51.

practice is to document in writing the appointing authority's consideration of the "12 factors" and the practice should be followed to the extent feasible. However, there is no external requirement that the State document its consideration of the 12 factors for all cases and there has been no finding by the VLRB during the audit period that the State failed to consider the 12 factors as required. Particularly for lower-level disciplinary actions, such requirements are unduly burdensome and would unnecessarily delay the process.

- *Case "Staffing"*: In all cases, once the investigation is complete DHR will forward the report to the appointing authority and discuss with the appointing authority whether it appears that misconduct has occurred and whether discipline should be pursued. This conversation can be a simple phone call between DHR personnel and the appointing authority, or the appointing authority can invite others to participate in the conversation. This process is sometimes referred to as a "staffing." DHR does not expect to implement the recommendation that all staffing discussions be documented. Many of the conversations which take place as part of the disciplinary process are protected by attorney-client and attorney work product privileges. These protections are in place for purposes of public policy, including the free and open discussion of sensitive matters which could lead to litigation. Once discipline is imposed the State has the burden of showing just cause before the VLRB and/or courts and may do this in a variety of ways, including live testimony. Creating additional documentation in these matters is burdensome, unnecessary, and is contrary to current statutory and collectively-bargained processes for evaluation. The courts and the VLRB determine the type and quality of evidence required to sustain a disciplinary action.

- *Progressive Discipline and Uniformity and Consistency*: While DHR understands the requirement to consider uniformity and consistency when making disciplinary decisions, DHR does not expect to implement the recommendation to require "DHR staff to provide a written summary of the subject employee's discipline history to staffing meeting attendees, including past discipline" in all cases. The guiding authorities have not set requirements for documenting how progressive discipline and uniformity and consistency requirement are considered or applied, nor have they prescribed the manner in which DHR advice is presented.<sup>2</sup> In order to ensure that management properly considers past employee misconduct and complies with requirements to consider uniformity and consistency, DHR attempts to capture all allegations in the SharePoint database, and as well as disposition by misconduct type, so a comparison can be made for uniformity and consistency purposes. This method is combined with a review of an employee's official personnel file (OPF) to ensure past discipline is captured. DHR is prevented from considering an employee's past discipline once it is removed from the OPF by applicable CBAs. By their very nature, stipulated agreements are not, and should not be, considered when

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employer to take them into consideration before a disciplinary action is imposed. Such factors duplicate some issues already discussed, but can serve as a reminder of matters which should be considered.

<sup>2</sup> From Personnel Policy 8.0: *Uniformity and Consistency of Discipline*. The contract provides that the State will "apply discipline or corrective action with a view toward uniformity and consistency." Appointing authorities should take into consideration, when deciding on an appropriate action, what action was taken against other employees in similar circumstances. However, the contract should not be taken to mandate rigid standards of uniformity.

## Appendix IV

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See comment 14 on page 51.

This mischaracterizes our recommendations. See comment 15 on page 52.

determining uniformity and consistency as they are non-precedential and often based on factors outside of the required disciplinary considerations, for example, litigation costs.

- *Documentation requirements for Appointing Authorities:* The Auditor made several recommendations for recordkeeping requirements to be carried out by Appointing Authorities. DHR does not expect to implement these recommendations. State of Vermont personnel functions were consolidated to a centralized model in 2009, and DHR was given responsibility for maintaining all personnel records. While some AAs may wish to maintain their own records, DHR, as the "official" keeper of personnel records, believes maintaining a duplicate or shadow personnel records system, is not efficient nor should it be necessary.

SAO Evaluation of Management’s Comments

The following presents our evaluation of comments made by the commissioner of the Department of Human Resources.

<p>Comment 1.</p>	<p>The commissioner’s comments are inaccurate. She suggests that generally accepted government auditing standards (GAGAS) limit the criteria available to auditors to legal authorities and recognized best practices, but this is not correct. GAGAS §6.37 states that auditors should identify criteria relevant to the audit objectives. Examples of criteria cited in the standard include not only laws and requirements, but also policies and procedures, the purpose or goals set by officials of the audited entity, measures, expected performance, defined business practices and benchmarks. During the course of the audit and as described in both the body of the report and the scope and methodology outlined in Appendix I, we considered the criteria in the documents described as guiding authorities in the commissioner’s comments as well as (1) business practices as contained in the DHR protocol for handling employee misconduct, DHR training documents, and communications with DHR management clarifying the State’s practices and (2) timeliness targets or benchmarks set by DHR. Accordingly, it is not accurate to state that we established new standards, rather we utilized those criteria that DHR had established itself.</p> <p>The comment letter cited a specific example in the “Other Matters” section on the reliability of the SharePoint® data in which we describe the data systems used to track misconduct investigations as not sufficiently reliable for purposes of our audit objectives. GAGAS §6.16 – §6.22 and §6.23 – §6.27 requires auditors to gain an understanding of internal controls and information system controls, respectively, that are significant to the audit objectives, which includes assessing the relevance and reliability of information. GAGAS §7.15 requires that we describe in the report the limitations or uncertainties with the reliability or validity of the evidence in conjunction with our findings and conclusions. In accordance with these standards we developed and implemented procedures to determine the completeness and accuracy of the SharePoint® system sites, found deficiencies and, as explained in the report, adjusted our methodology so as not to rely on these systems, and reported on the weaknesses found.</p> <p>That the commissioner cites our reporting on the reliability of the SharePoint® systems as an example of alleged misapplication of auditing standards seems particularly incongruous given the evidence. The systems contained 180 records of misconduct cases in the five departments in our scope between 2014 and 2016, but at VVH alone there were at least an additional 179 misconduct cases not entered into the systems. In addition, 31 of the 55 cases reviewed contained errors (inaccuracies or blanks) in fields such as date opened and closed, investigator, and case disposition.</p>
<p>Comment 2.</p>	<p>Our report acknowledges that there are circumstances in which the CBAs allow an AA to relieve an employee from duty with pay as a misconduct case is being addressed, and we did not take issue with decisions that resulted in employees kept in RFD status after the investigation was completed if those employees subsequently left State employ (e.g., were dismissed or resigned). However, there were 17 cases in our companion report and two cases in this report in which employees were not dismissed but were nonetheless kept in RFD status for weeks or months after the conclusion of the investigation. For example, in one AOT case, the State continued to pay the employee for not working for 2.5 months after the investigation was completed yet the disposition decision was a suspension. We do not believe that the taxpayer should be responsible for paying an employee not to work after the completion of an investigation if there is reason to believe that the employee will ultimately be returned to work.</p>

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Comment 3.	Relying on verbal guidance is a high-risk practice that makes it more likely that mistakes will be made or cases will not be addressed in a timely manner. Moreover, the State’s internal control standards state that documentation of policies and procedures is critical to the daily operation of a department, without which poor decisions can be made and the effectiveness of operations adversely affected.
Comment 4.	This report compared the time it took to complete investigations and dispositions to 60-day and 30-day targets, respectively, as contained in the DHR protocol. We did not recommend “rigid standards,” and indeed stated that there could be multiple targets related to the disposition of cases to address variations in circumstances. Tracking actual results to targets or benchmarks is an important evaluation tool to assess whether activities are being performed as desired and whether changes to a process need to be made in order to improve efficiency and effectiveness.
Comment 5.	This report addresses the types of factors contributing to delays as described in the commissioner’s comments—see the timeliness sections in both the Objective 2 and Objective 3 findings.
Comment 6.	<p>The commissioner’s comments regarding the VLRB’s decisions are misleading since the State can negotiate a settlement before a case is decided by the VLRB. For example, in 2014 an employee submitted a grievance to the VLRB of his dismissal due to misconduct that was based, in part, on an assertion that the imposition of discipline was untimely. The State signed a stipulated agreement with this employee settling the grievance that rescinded the dismissal and imposed a 14-day suspension with back-pay from the date of the dismissal until the effective date of the agreement that totaled about \$17,000. Concerns over timeliness can also affect the decision to impose discipline.</p> <p>As DHR indicated earlier in the paragraph, timeliness benchmarks were adopted to assist organizations in managing the misconduct processes. We agree with the importance of setting such benchmarks, but believe that it is also important to measure the extent to which they are being met. Indeed, DHR’s comments are inconsistent with its own practice. Specifically, for at least the last two years, DHR has established and reported publicly as part of the State’s programmatic performance measure budget report, measures related to the length of investigations performed by the DHR investigations unit.</p>
Comment 7.	<p>Throughout section 5 of the commissioner’s response, she indicates that documentation of decisions and their rationales is not required or is burdensome and unnecessary. This is contrary to the State’s internal control standards, which call for documenting critical decisions and significant events. According to the standards, by recording such decisions and events, management creates an organizational history that can serve as justification for subsequent actions and decisions. For example, there were 20 cases out of 70 that did not have an investigation report. Without reports documenting the investigative steps and findings of an investigation, the State does not have documentation of information relevant for documenting critical decisions and significant events over the course of a misconduct investigation. The standards also state that documentation should be complete, accurate, and recorded timely.</p> <p>Contrary to the State’s standards, we found that a variety of critical decisions and events pertaining to employee misconduct allegations were not documented, including (1) whether to investigate allegations, (2) the party responsible for dispositions, (3) the rationale for the decision to impose a particular type of discipline, and (4) how progressive discipline is being applied. We added references to the State’s internal control standard to the report to specify the State’s documentation expectations.</p>
Comment 8.	This comment is not relevant to this audit, as the report does not address DHR’s methods of investigation, although we did comment on the importance of investigation reports.

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Comment 9.	There is no record of management decisions or a log of allegations and what, if any, action was taken when an allegation is reported (unless the decision was to investigate, at which point a record should be added to the DHR IU SharePoint® site).
Comment 10.	The commissioner misrepresented our recommendation. We did not recommend that consideration of the 12 factors be documented in all cases. Instead, we recommended that when considering the imposition of <u>discipline</u> in an employee misconduct case, the five organizations in our scope, in conjunction with DHR, document the rationale used in the decision-making process, including how the 12 factors were applied. About a third of the cases we reviewed included discipline.
Comment 11.	The commissioner misrepresented our recommendation. We did not recommend that staffing discussions be documented but rather that the decisions be documented. Specifically, we recommended that the applicable department, in conjunction with DHR, develop a process to document the decisionmaker for each disposition of an employee misconduct case, when the decision was made, and confirmation that the disposition was carried out. In addition, we do not believe that relying on live testimony is a good strategy as an individual’s memory may not be reliable. For example, in one case, the DHR IU SharePoint® site listed a case as closed and the disposition as unsubstantiated misconduct. When questioned by the SAO, the DHR staff attorney who investigated the allegation acknowledged that she had limited information and could not recall when she was made aware of the allegation or provide documentation of the disposition of the case.
Comment 12.	We disagree with the commissioner’s assertion that additional documentation is “contrary to current statutory and collectively-bargained processes for evaluation.” While these requirements may not mandate additional documentation, the commissioner cited no evidence that the State is prohibited from developing practices to document their critical decisions and significant events, as called for in the State’s internal control standards.
Comment 13.	We found that there was no reliable central source to determine whether an employee had been the subject of previous disciplinary action or had signed a stipulated agreement that states, for example, that it is the employee’s “last chance.” According to DHR training materials, the SharePoint® sites maintained by the AHS and DHR investigations units are the sources that should be used to collect data on prior comparable conduct and discipline. However, the sites did not include a substantial number of misconduct cases and had significant inaccuracies, including incorrect case dispositions. There were also cases in which employees’ personnel files did not include disciplinary action or stipulated agreements. As pointed out by the commissioner, the CBAs allow certain disciplinary action to be removed from the official personnel file. However, as stated in the report, such circumstances are very limited. For example, an employee may request that suspensions of three or fewer days be removed after five years if the employee has no other discipline in that time. Nevertheless, we added to the report DHR’s assertion that it is prevented from considering past discipline in these types of circumstances.
Comment 14.	Our comments in the report on the consideration of stipulated agreements pertained to the application of progressive discipline. In particular, some stipulated agreements explicitly state that it is the employee’s “last chance.” In one case the agreement states that “[employee] and VSEA further agree that this agreement shall act as a ‘last-chance’ for similar acts ... [employee] and VSEA also agree that any similar misconduct [employee] commits in the future will constitute just cause for her dismissal from [department] and/or the State of Vermont.” In another case, the disciplinary history section of the 12-factor analysis for a dismissal disposition cited a prior stipulated agreement in which the employee had agreed that any future related acts of misconduct would be just cause for his dismissal. Lastly, stipulated agreements sometimes explicitly state that the action agreed to (e.g., suspension) constitutes discipline. Accordingly, it behooves the State to have a reliable central source to identify such agreements as well as other disciplinary actions in the event the employee engages in future misconduct.

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Comment 15.	The commissioner mischaracterized our recommendations. We recommended that the departments develop processes, in conjunction with DHR, to document decisions and their rationale. We did not specify that such documentation be maintained outside of DHR's normal recordkeeping processes. Since the appointing authorities in the departments are responsible for the decisions, we believe that they should be responsible for documenting their decisions and rationales, but not necessarily for maintaining these records. Nothing in the recommendation precludes DHR from still serving as the recordkeeper.
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