COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11788

Hearing Officer Appointment: January 25, 2022
Hearing Date: March 25, 2022
Decision Issued: April 23, 2022

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance on December 10, 2021, of a Group III Written Notice with termination (violations of Written Notice Offense Codes 13, 36, 37, 39 and 73) by the Virginia Information Technologies Agency ("VITA" or the "Department" or the "Agency").

Pursuant to the Written Notice, the Grievant's employment was terminated December 10, 2021.

The Grievant has raised the issues specified in his Grievance Form A and is seeking varied relief, including removal of the Written Notices from his record, reinstatement, back pay, restoration of benefits and attorney's fees.

The hearing officer's appointment is effective January 25, 2022.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant and the Agency were represented by their respective attorneys. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.

The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely the sum of Agency Exhibits 1-15, 17-25 and 27 in the Agency's exhibit binder. Additionally, Agency Exhibit ("AE") 28 was withdrawn; AE 26 was not admitted; and with the exception of the voicemail recording of 12/31/21, all voicemails in AE 16 were admitted. All Grievant's exhibits were admitted into evidence (GE 1-10).

The parties agreed to the following stipulation: "Mr. W was a contractor for VITA in early to mid-2019. Mr. W worked with the Grievant in a substantially similar role to that of A, when he joined VITA as a full time employee. During this period, Mr. W did not encounter anything he would regard as a hostile work environment."

The hearing was held virtually via Zoom pursuant to the Scheduling Order entered February 3, 2022, incorporated herein by this reference.

APPEARANCES

Representative for Agency
Grievant
Legal Counsel
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed full-time by the Agency as an Information Technology Manager II. AE 8 at1.

2. A was also so employed. The Grievant and A, together, with equal responsibilities and essentially as peers, ran the Agency's web application vulnerability services program. While A also served as an intern, he was hired full-time by the Agency just over 2 years ago. Grievant was employed by the Agency for some 15 years.

3. On February 23, 2021, an employee of a different work unit complained regarding Grievant's interactions with her. Both the Grievant and that employee were both separately counseled by their managers for unprofessional, inappropriate interactions and communications.

4. On November 9, A filed a complaint against the grievant, alleging workplace harassment, which included concerns of bullying and creating a hostile work environment.

5. On November 16, 2021, the Grievant's supervisor (the "Supervisor", who also supervised A) informed the Grievant that VITA had opened an investigation into the matter and that the Grievant would be placed on leave with pay during the investigation.

6. The Agency performed a thorough investigation under the auspices of its HR department. The person primarily responsible for the investigation has 12 years' experience in HR and she credibly found the allegations of A against the Grievant substantiated. AE 10.

7. During his testimony, the Grievant essentially admitted much of the misconduct described in the Written Notice.

8. Additionally, screenshots of Grievant's instant messages, voicemails and emails were cogent, convincing evidence to support A's claims. For example, as

Grievant's behaviors were escalating, Grievant threatened to come to the house of A to "talk down" to him:

"If I ever want to talk down to you I'll come to your house." AE 11 at 8.

9. A perceived this as a threat to his safety because Grievant knew where he lived and under the circumstances and in the context presented, it could be reasonably be perceived as such. Grievant flippantly threatened to assassinate the President of the United States and talked about how he previously "rolled in with an ax to remove some heads, rape and pillage." Id. at 5 and 10.

10. Grievant referred to A in these messages as:

- Snaky (AE 11 at 4)
- Disrespectful Id.
- Big Boy Id. at 7
- "You need to become a conservative" Id. at 9
- "You schooling me?" Exhibit 12 at 4.
- "If you are not a liberal when young you don't have a heart. If you're not a conservative when your [sic] old you don't have a brain." Id. at 7.
- "If someone said it's a good idea to shit in the kitchen and eat in the bathroom you have to realize it's a stupid idea." Id. at 8.
- "I will tease you for being a liberal. But I'd also pick up a rifle to protect your right to be one." Id at 9.
- After sending angry gibberish, Grievant said, "You should know by now that there is a reason for everything I do. And I am right most of the time." Id. at 10.

11. After A sent an email to the Supervisor with a solution to a problem, at 11:22am on November 15th, Grievant sent A an email at 12:15pm telling him, "This is a **shitty show off way** to do it. You could have simply asked me if I was planning on doing the update soon. I find this **unbecoming of my helper**. I'm sad you haven't learned more from me by now." AE 13 at 3 (emphasis added).

12. Grievant admitted in a call to the human resources director that he was trying to convert the victim politically to make him a good person. AE 16.

13. A credibly testified that the Grievant's hostility and harassment, exhaustively shown in excruciating detail in the hearing, left him emotionally drained, causing him to take leave for his mental health.

14. As the Written Notice states, "During the investigation, [Grievant] continued to contact the colleague who filed the compliant [sic] with inappropriate voicemails and emails, even after he had been instructed to have no contact." AE 2& 18.

15. On November 30, 2021, the HR Director contacted Grievant to admonish him for contacting the victim despite being instructed not to do so. AE 18 at 2.

16. VITA leadership and the HR Manager primarily responsible for the investigation issued Grievant due process on December 6th at 2:15pm. During the meeting, Grievant told them that they were probably going to go to hell. AE 10 at 23.

17. Also on December 6, 2021, immediately after receiving advance notice that the Agency was considering termination and giving the Grievant an opportunity to respond, Grievant sent an email to Grievant's and A's team, at 2:27pm, disclosing A's entire complaint and disparaging A. AE 21.

18. Amongst other things, Grievant admitted and stated in this email, "Yes, I said some inappropriate things that hurt [A's] feelings. But, I was very sick and struggling. And I never meant to be threatening, condescending or evil in anyway. I don't have the animosity for [A] as he has for me. I think firing me is an extreme and unequal punishment. Just be super careful who you trust and what you say. Until we meet again!" Id.

19. Recognizing the hostile, retaliatory, harassing and bullying nature of the Grievant's email, the Supervisor wrote to HR, stating, "Communicating it in that way makes [A] a social pariah. This is not acceptable to me." AE 21 at 3.

20. The Agency set a meeting with the Grievant on December 10th concerning the discipline. AE 1 at 10. Grievant declined the meeting. Id. He later claimed in an email that he "didn't even see you had a meeting." Id. at 11. The Agency issued to the Grievant a Group III Written Notice with termination effective the same date, for violation of Policy 2.35, Civility in the Workplace. AE 4.

21. The Grievant's disciplinary infractions concerning this case did negatively impact the Agency's operations.

22. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

23. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

24. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

25. The Grievant received significant training concerning the policies at issue in this proceeding. AE 7.

26. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, POLICY, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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

access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). AE 9. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Grievant's disciplinary infractions were reasonably classified by management as a Group III offense. The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the Agency's attorney that the offenses are appropriately classified at the Group III level with the Agency appropriately exercising the discipline. Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

This case involves the recently established DHRM Policy 2.35, *Civility in the Workplace* (Effective 1/1/19) which supersedes the former Policy 1.80, Workplace Violence, and former Policy 2.30, Workplace Harassment.

As stressed in the purpose of Policy 2.35, "It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity and inclusion. In keeping

with this commitment, workplace harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind are prohibited in state government agencies." AE 4.

Policy 2.35 further provides:

"The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace. Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable." AE 4.

Both *Discriminatory Workplace Harassment* and *Non-discriminatory Workplace Harassment* are prohibited by Policy 2.35. Policy 2.35 defines the term *Non- Discriminatory Workplace Harassment* [Harassment not based on protected classes] as:

"Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion to a person not predicated on the person's protected class." AE 4.

Policy 2.35 describes *Discriminatory Workplace Harassment* [Harassment Illegal under Equal Employment Laws] as follows:

"<u>Discriminatory Harassment</u>

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race; traits historically associated with race including hair texture, hair type, and protective hairstyles such as braids, locks, and twists; sex; color; national origin; genetic information; religion; sexual orientation; gender identity or

expression; age; **political affiliation**; veteran status; pregnancy, childbirth or related medical conditions; or disabilities, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

As argued by the Agency's attorney, the Grievant 's position that A never told him he was offended is misguided. Under the general provisions of timely reporting, employees and third parties should report incidents of prohibited conduct as soon as possible after the incident occurs. However, the policy is, and it was emphasized in the training, that it is never the job of the victim to tell the perpetrator to stop – but the job of the perpetrator to not engage in the behavior in the first place. Id. at 56. The Grievant was reminded that "intent" to harass is not the test. Id. at 57. It's conduct – not intent – that is at issue.

In any event, the Supervisor testified that he told Grievant at least twice that his behaviors towards A were not acceptable. The evidence clearly showed that Grievant's conduct undermined team cohesion, A's morale, A's productivity and well-being.

The Policy Guide to Policy 2.35 provides further support for the Agency's discipline:

"The Civility in the Workplace policy defines prohibited conduct in general terms. Because all potential behaviors cannot be anticipated or listed, this guide provides some examples of prohibited behaviors but is not intended to be all inclusive…

Disciplinary actions to address prohibited behaviors may be taken on a progressive basis **or actions may be taken upon the first occurrence, depending upon the nature and seriousness of the conduct**. The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in

determining if the behavior is prohibited. A "reasonable person" standard is applied when assessing if behaviors should be considered offensive or inappropriate.

Prohibited Conduct/Behaviors may include, <u>but are not limited to:</u>

…

- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;
- Making disparaging remarks, spreading tumors, or making innuendos about others in the workplace;

…

- Making culturally insensitive remarks; displaying culturally insensitive objects, images, or messages;
- Making demeaning/prejudicial comments/slurs or attributing certain characteristics to targeted persons based on the group, class, or category to which they belong;"

AE 4.

While the Grievant argues that the Agency's discipline was too harsh under the circumstances, the hearing officer finds, to the contrary, that Management's expectations were clearly communicated to the Grievant on multiple occasions. *See, e.g.,* the training documents at AE 7.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that the violations rose to the level of a

Group III offense. Violations of Policy 2.35 can constitute either a Group I. II or III offense, depending on the nature of the offense. SOC; AE3 at 23.

In case 2021-5194, EDR clearly articulated that, "Policy 2.35 and its associated guidance permit agencies to assess the severity of an offense and its effect on the workplace in selecting the appropriate level of discipline. These determinations are fact-specific and subject to substantial discretion by agency management; thus, disciplinary actions are not necessarily comparable across state agencies." EDR Case 2021-5194 at 9.

Instead issuing multiple Group II Written Notices, the Agency issued one Group III Written Notice, well within its prerogative.

In Case 2020-5003, EDR reversed a hearing officer's reduction of a Group III Written Notice to a Group II Written Notice, on the basis that each separately considered act of misconduct would only amount to a Group II Written Notice not a Group III Written Notice.

Grievant also seeks to caste blame on to the victim for not complaining earlier. However, the hearing officer agrees with the Agency attorney's position that, while timely reporting is promoted under the general provisions of the complaint procedures, it does not negate Grievant's misconduct under the facts and circumstances of this case. *See, also,* Agency Brief of April 8, 2022, at 18 - 20.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

> DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the Grievant's many years of good service to the Agency;
2. the demands of the Grievant's work environment;
3. the Grievant's good job performance and evaluations;
4. the Grievant's described difficulties;
5. the Grievant's lack of formal discipline in the past; and
6. the Grievant's asserted absence of intent to offend.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and

will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the policy is important to team cohesion, morale, the proper functioning of the Agency, and the Agency issued to the Grievant significant prior training and notice in the past. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

ENTER 4/ 23 2022

John Robinson

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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