

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

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11805

Hearing Date: May 11, 2022
Decision Issued: June 7, 2022

PROCEDURAL HISTORY

On January 26, 2022, Grievant was issued a Group III Written Notice of disciplinary action, with job termination. The offense was violating hiring practices by giving one applicant an unfair advantage over all other applicants.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 14, 2022, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On May 11, 2022, a hearing was held via remote video.

Both the Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. Following the hearing, both sides were permitted to file post-hearing briefs by May 25, 2022, and their briefs, dated May 25, 2022, are made a part of the grievance record. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual (GPM) § 5.8.* However, § 5.8 states “[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.” A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. 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).

Code § 2.2-3000 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.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer*

Serv., 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting *Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

While the hearing officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... “the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.”

The Agency’s Policy for Recruitment and Selection provides the stated purpose

to hire the best qualified and most suitable applicants – ensuring at all times that, all applicants for employment shall be afforded an equal opportunity and evaluated on the principles of merit.

Agency Exh. 3, p. 23.

Policy 1.60, Standards of Conduct, requires employees to:

- Perform assigned duties and responsibilities with the highest degree of public trust.
- Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.
- Use state equipment, time, and resources judiciously and as authorized.
- Meet or exceed established job performance expectations
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Comply with the letter and spirit of all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations.
- Report circumstances or concerns that may affect satisfactory work performance to management, including any inappropriate activities (such as fraudulent, illegal, unethical, or discriminatory actions) of other employees.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 4, pp. 2 and 3.

A Group III offense includes acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that constitute illegal or unethical conduct, neglect of duty, disruption of the workplace, or other serious violations of policies. The Standards of Conduct, Agency Exh. 4, p. 9.

The Offense

The Group III Written Notice, issued by the Agency commissioner on January 26, 2022, detailed the facts of the offense, and concluded:

Violation of DHRM Policy 1.60, Standards of Conduct; DHRM Policy 2.10, Hiring; VDH Policy 2.10, Recruitment and Selection. For recruitment of position # 04696, Assistant Director of Internal Audit, it was determined through an independent investigation that [the Grievant] violated the hiring practices for the Commonwealth of Virginia-VDH. Based on the findings, [the Grievant] was identified as the hiring manager and multiple discrepancies were identified to support the allegations such as using her hiring authority to subvert the panel interview process and tainting the recruitment process by giving one (1) applicant an unfair advantage over all other applicants selected for an interview.

Agency Exh. 2. The Agency found no mitigating circumstances weighed against job termination. The date of offense was deemed to be the job posting date of July 16, 2019.

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

The Agency employed the Grievant as director of internal audit since April 2019, without other active disciplinary actions.

Following complaint made, the Agency initiated an investigation into the Grievant's alleged preferential hiring of the deputy director of internal audit. The investigation concluded that the Grievant's selected candidate did not meet the established minimum screening criteria; that the screening criteria were adjusted to accommodate the selected candidate's lack of demonstrated abilities; that the Grievant exercised her hiring authority against the consensus of the interview panel members; and, that the Grievant inappropriately coached her selected candidate. Agency Exh. 1, p. 3.

The selected candidate, during disciplinary process, asserted to the Agency the revelation of preferential treatment by the Grievant related to his hiring. The candidate testified that he and the Grievant had been in an intimate personal relationship up to and including the interview process and hiring in 2019. Their personal relationship started in early 2019 and ended in early 2020. The candidate testified that the Grievant solicited him to apply for the job and told him it was his for the asking. The candidate testified that the Grievant provided to him information and material to prepare him for the interview process that started in August 2019. The candidate testified that he and the Grievant decided to keep the relationship secret while he applied for the job, interviewed, and after being hired. When an earlier examination of his hiring was conducted by the Office of State Inspector General (OSIG) following an anonymous complaint, the candidate and Grievant specifically concealed their personal intimate relationship. The OSIG investigation found some irregularities but was inconclusive on the issue of pre-selection. Agency Exh. 20. The candidate testified that he, alone, was provided inside information about the interview process, and that he lacked essential experience and skill for the position. The

candidate testified that he ultimately disclosed all of this when he himself was being disciplined because he wanted to ease the burden on his conscience and stop the lying.

The former commissioner testified that the Grievant's lack of integrity and untrustworthiness in this hiring process was outrageous conduct—particularly for the head of internal audit, a position inherently about trust.

Following the candidate's disclosures, a division director at another agency, MR, was asked to lead the Agency internal investigation. MR testified that her investigation concluded that the Grievant gave unfair preference to the candidate. MR testified that in her interview with the Grievant, the Grievant admitted that she told the candidate to review and study the seven principles of auditing and disregarded panel interviews. While there are emails between the candidate and the Grievant about his thank you note to the panelists, the Grievant denied she reviewed the note and denied coaching the candidate.

In contrast to the testimony of the selected candidate, the Grievant testified that she had only a brief affair with the candidate that ended well before the hiring process. The Grievant testified that she knew professionally the candidate's leadership qualities and compartmentalized her personal relationship with the candidate. Further, the Grievant testified that the selected candidate was the best qualified candidate for the position. While the other interview panelists did not agree about the selected candidate's qualifications, the Grievant's summary of the interview inaccurately states consensus in favor of the selected candidate. Regardless, the Grievant had the hiring power irrespective of the interview panelists' assessment. Despite her denial, an email from the Grievant to the selected candidate confirms that the Grievant provided at least some advice to the selected candidate. Other email messages in the record confirm that the Grievant and the selected candidate had an intimate personal relationship that was not disclosed in the hiring process or the prior OSIG review of the hiring process. Agency Exh. 8.

In her grievance writings, the Grievant stated about her job duties and responsibilities:

I am accountable for ensuring agency compliance with state & federal laws and regulations to ensure that internal controls are in place. The position I hold requires the utmost demonstration of adherence and compliance. So much so that I pledge an oath to the IIA Board of Governors as a Certified Internal Auditor and to the Board of Certified Fraud Examiners that I will do my job to the best of my ability and in every aspect perform my duties with integrity, independence and be free from all biases.

Agency Exh. 1, p. 8. The Agency commissioner expressed the same high level of trust expected of one in the Grievant's position, and he explained that the level of trust incumbent in the Grievant's position eliminated discipline less than termination.

Analysis

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 (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

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 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. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has 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.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has reasonably proved the misconduct of the Group III Written Notice.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice. The Grievant's documented mischaracterizations of the interview panelists' opinions was not sufficiently explained. The Grievant was unconvincing regarding her denial of a continuing personal relationship with the candidate during the hiring process, regardless of the level of their intimacy. The relationship was not one limited to professional. The Grievant argues that the selected candidate's testimony should be given little to no weight as his testimony

was self-serving, only served to embarrass him and the Grievant, and did not demonstrate any level of integrity or the best interests of the agency.

While the motivation of the candidate's story is questioned by the Grievant (springing from the selected candidate's own disciplinary process), the candidate's testimony regarding their relationship is corroborated by documentation in the record authored by the Grievant herself (at least to some extent). The Grievant argues that no one advised her during the hiring process that she was in violation of any policy by hiring someone whom she previously knew professionally. Of course, that is not a policy violation, but concealing an intimate personal relationship with the candidate and providing assistance during the process to the candidate were not disclosed to any colleagues. This omission renders the interview panel and other processes of hiring a pretense. The evidence preponderates in showing that the Grievant exercised bias in favor of the candidate (regardless of the extent), contrary to the letter and spirit of the Commonwealth's hiring processes and the integrity expected of one in the Grievant's audit position of trust.

The Grievant also asserts the Agency violated Policy 1.60 when the Grievant was placed on a pre-disciplinary leave from December 13, 2021, through January 26, 2022. My authority is limited to the grievance hearing process on the merits of the alleged offense. Even if I could conclude an Agency violation of the pre-disciplinary leave policy, I have no remedy beyond that within the grievance procedure. EDR has held that any potential deficiency in a grievant's pre-disciplinary due process is cured by the post-disciplinary due process. EDR Ruling Number 2022-5332 (January 13, 2022); *see, also, Va. Dep't of Alcoholic Bev. Control v. Tyson*, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014).

The Grievant's evidence and testimony establishes the essential facts of the offense. The offense falls squarely within the scope of a Group III Written Notice as a severe violation of policy and trust. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group III Written Notice. The Agency conceivably could have imposed lesser discipline, but its election for a Group III Written Notice, with termination, is within its discretion to impose progressive discipline.

Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules*, § VI.B.1.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM].” Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that the breach of trust in a leader of the internal audit division could not be mitigated to less than job termination with the issuance of a Group III written notice.

Given the nature of the Written Notice, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline. The Agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

Termination is the normal disciplinary action for a Group III Written Notice. A hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. While the Grievant asserted disparate treatment, there is insufficient evidence of another situation or similar offense treated differently. This was not a situation outside the Grievant’s control. Here, given the inherent level of trust incumbent with the Grievant’s position as director of internal audit, the nature of the offense has implications of aggravating circumstances. As the Grievant stated about her job requirements: “in every aspect perform my duties with integrity, independence and be free from all biases.” Agency Exh. 1, p. 8.

The Grievant had a long tenure with the agency and had a record of satisfactory work performance. Regardless, under the *Rules*, however, an employee’s length of service and satisfactory work performance, standing alone, are not sufficient for a hearing officer to mitigate disciplinary action. *Thus, the hearing officer lacks authority to reduce the discipline on these bases.* On the issue of mitigation, the Grievant bears the burden of proof, and she lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

The Grievant asserts disparate treatment of the discipline options that did not permit her to resign in lieu of termination. The Grievant points to the fact that the selected candidate, when being disciplined, was allowed to resign in lieu of termination. The selected candidate, however, was not in a comparable position as the Grievant’s, and the Agency commissioner changed between the two disciplinary events. Based on the distinguishing circumstances, I cannot conclude disparate treatment was applied.

Under the EDR's Hearing Rules, the hearing officer must give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the extent of the disciplinary action. In light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice, with job termination, must be and is upheld.

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 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.

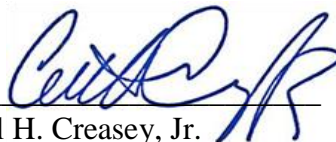
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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]

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

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer