

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management**

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re: EDR
Case Nos.: 11884, 11926**

Hearing Date: April 3, 2023
Decision Issued: April 13, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed for Case Number 11884 effective October 3, 2022. Upon being appointed, a pre-hearing telephone conference was conducted and the Grievance Hearing was scheduled for December 1, 2022.

Per EDR Ruling Number 2023-5487, the case was consolidated with Case Number 11926 for a single hearing. The appointment of the Hearing Officer for Case Number 11926 was effective February 8, 2023.

Upon being appointed as Hearing Officer for the consolidated matters, a pre-hearing telephone conference was conducted and the Grievance Hearing was scheduled for April 3, 2023. Both the Agency and Grievant provided in a timely manner two notebooks with exhibits and lists of witnesses to be called. The Grievance Hearing was conducted on April 3, 2023.

The Grievance Hearing addressed the following written notices:

1. Written Notice issued July 8, 2022 (offense dates 1/15/21-7/18/22), Group II alleging failure to follow supervisor's instructions, insubordination and non-discriminatory workplace harassment. Discipline was suspension for five working days. (DHRM Standards of Conduct 1.60 and DHRM Civility in the Workplace Policy 2.35)
2. Written Notice issued November 22, 2022 (offense dates 8/18/22 & 8/31/22), Group III, alleging disruption of the workplace/aggressive & abusive behavior. Discipline was termination of employment. (DHRM Standards of

- Conduct 1.60 and DHRM Civility in the Workplace Policy 2.35)
3. Written Notice issued November 22, 2022 (offense dates 6/14/22-9/26/22), Group II alleging disruption of the workplace. Discipline was termination of employment. (DHRM Standards of Conduct 1.60 and DHRM Civility in the Workplace Policy 2.35)
 4. Written Notice issued November 22, 2022 (offense dates 8/26/22-10/5/22), Group II alleging disruption of the workplace. Discipline was termination of employment (DHRM Standards of Conduct 1.60-Expectations & Conduct for Employees)
 5. Written Notice issued November 22, 2022 (offense dates 8/18/22-8/31/22), Group II failing to follow instructions and insubordination. Discipline was termination of employment. (DHRM Standards of Conduct 1.60 and DHRM Civility in the Workplace Policy 2.35)
 6. Written Notice issued November 22, 2022 (offense dates 10/31/22-11/3/22), Group II alleging intentional disrespect and negative impact on Agency operations. Discipline was termination of employment. (DHRM Standards of Conduct 1.60 and DHRM Civility in the Workplace Policy 2.35)
 7. Written Notice issued November 22, 2022 (offense date 10/24/22), Group III alleging failure to follow policy regarding electronic communications, disrespectful behavior, cyber bullying and discriminatory harassment. Discipline was termination of employment. (DHRM Standards of Conduct 1.75, DHRM Standards of Conduct Policy 2.35 and DHRM Standards of Conduct Policy 1.60)

APPEARANCES

Grievant
Grievant's Attorney

Agency Party Designee
Agency's Attorney

ISSUES

1. For each of the seven Written Notices, did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Whether for each of the two Group III Written Notices was any such violation a Group III violation under the Standards of Conduct?

3. Whether for each of the five Group II Written Notices was any such violation a Group II violation under the Standards of Conduct?
4. Whether the Agency considered mitigating and aggravating factors as to each?
5. Whether the Agency's termination of the Grievant's employment was consistent with law and policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual (GPM) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in two notebooks with tabs 1-63.

The Grievant's Exhibits admitted into evidence are contained in two notebooks, the first notebook with tabs 1-8 and the second notebook with tabs 1-18.

FINDINGS OF FACT

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

The Agency employed Grievant as a Human Services Program Specialist under the parameters set out at Agency Exhibit 8. As such, Grievant's conduct is governed by the following:

1. Policy 1.60-Standards of Conduct (3/7/2022)
2. Policy 1.60-Standards of Conduct (4/16/2008)
3. Policy 2.35-DHRM Civility in the Workplace
4. Policy 1.40 Performance Planning and Evaluation

The Agency's first witness, the Director, (since February, 2021), of the program for which the Grievant is employed testified that nine employees reported directly to the director and

that there were forty employees in the department. The witness testified that the Supervisor of the Grievant complained that the Grievant failed to respond to repeated questions regarding the Grievant's whereabouts. The Grievant's behavior resulted in a counseling memorandum dated January 21, 2021 as a violation of Policy 1.60, failure to follow supervisor's instructions. (Agency Exhibit 14)

The witness reviewed the Grievant's mid-year performance review (10/25/2020-4/30/2021) in which the Grievant is deemed a "contributor", meaning that the Grievant's results at work are characterized by meeting job functions and fully meeting performance measures. (Agency Exhibit 9, Page 4) It was noted in the mid-year review that the Grievant "tends to assume that other team members know what he knows. Additionally, ...on a number of documented occasions refused to answer questions related to (Grievant's) specific whereabouts during work hours." (Agency Exhibit 9, Page 10) It was also noted at page 16 of Exhibit 9 by the Grievant's "indirect manager" the following:

I am proud of how cohesively the PrEP team came together during the first nine months of the COVID-19 public health crisis... (the Grievant) was a critical player in the success of the team... Since January, while (Grievant) has continued to perform routine duties, (the Grievant) has withdrawn from the team and developed a more negative communication pattern. (The Grievant's supervisor) has made efforts to address and improve their employee/supervisor relationship by meeting with (the Grievant), consulting with me and my supervisor, as well as our Deputy Director and our Human Resource consultant. They recently participated in voluntary mediation, but I have not yet seen much of a change with (Grievant's) behavior. The changes in (the Grievant) upgraded tensions within the team and others outside of the team have also noticed. I remained hopeful that (the Grievant) will seek out and accept any necessary supporting coaching and realize that (Grievant's supervisor) as well as myself and DDP leadership, care about (the Grievant's) importance to our program." The witness then testified that around September, 2021 the witness became Grievant's supervisor.

The witness then reviewed the Grievant's annual performance review for 10/25/2020-10/24/2021 (Agency Exhibit 10). While the review again deemed Grievant to be a "contributor", the Grievant's supervisor noted that the Grievant's willingness and/or ability to communicate have declined noticeably during the review period. Again, it was noted that the Grievant started to isolate himself from other members of the team in January 2021. "This isolation was physical ((Grievant) moved from his cube to an office, with the doors always closed) and emotional ((Grievant) communicates far less with other team members since the move)." In addition, Grievant's supervisor set out the details of an occasion when the Grievant gave medical advice when (the Grievant) is not licensed to provide medical advice. (Grievant Exhibit 10, Page 13) It was also noted that a performance improvement plan would be part of his performance review. (Agency Exhibit 10, Page 19)

The witness next reviewed the Notice of Needs Improvement Development Plan with a due date of 1/31/2022. (Agency Exhibit 11) which says on page 4 “Since your receipt of the Memorandum: Expectations for Conduct in the Workplace, dated January 21, 2021 your professional conduct has not improved as your conduct has had an impact on your colleagues and the operations of the program and represents a violation of DHRM Policy 1.60.” The Grievant’s response, set out at page 6 of the Exhibit, stated: “This development plan was created based on the optional mid-year review evaluation, that I was told that I had to sign, and the year end evaluation that is currently in question based on the false statements of my manager...A grievance has been filed because of the false information...I shouldn’t have to do any of this, because it was all based on proven false statements. I have attached a copy of my grievance and both internal complaint forms that have been submitted to Human Resources starting on February 24, 2021.” (Agency Exhibit 11, Page 6) The witness then testified that the Grievant continued to be combative.

The witness next reviewed Agency Exhibit 12 which the Grievant dated 11/22/2021 alleging that the Grievant’s supervisor falsified a document and that another employee “logged into Grievant’s account for jury duty, requesting that they both be fired. The grievance was administratively closed on December 10, 2021 due to non-compliance. (Agency Exhibit 12, Page 3)

The witness next reviewed management’s offer to transition the Grievant to another program as a “great opportunity to establish relationships with the (new) team and allow you to do some QA, which you excel in...I’m asking you to provide us with your decision by COB, Tuesday, December 21. Again, this transition would essentially remove the frustrations and concerns you’ve discussed within your current program” The Grievant at 4:57 on December 21, 2021 advised “I have to decline this offer, on principal alone” However, after reconsidering, the Grievant accepted the offer. (Grievant Exhibit 15)

The witness next testified about the difficulties with Grievant’s transition to the new team. Agency Exhibit 16, Page 1 indicated that the Grievant on January 14, 2022 was told to fill out the “legacy packet” and to remember to drop off the PrEP cell phone in either ____ or ____ office. On January 25, 2022 at 10:20 am Grievant’s supervisor emailed Grievant “I left you a voicemail. I’m not sure if you received it or not. I wanted to make sure you knew to continue to answer the PrEP phone until it is returned.” Again, on January 25, 2022 at 12:18 pm Grievant’s new supervisor asked when the Grievant would be dropping off the cell phone “so I can let the PrEP team know.” Again, on February 1, 2022 at 11:16 am Grievant’s supervisor emailed “Please drop off the PrEP cell phone in either ____ or ____ office by tomorrow noon at the latest.” The Grievant responded on February 1, 2022 at 11:58 am “The PrEP phone was placed in the file room this morning. Here is a photo of the phone, box and charging cable.” The witness proceeded to testify that the witness believed the Grievant’s behavior was intentional due to the fact that the two offices identified as where the phone should be dropped were the offices of the Grievant’s former supervisor and the other person the Grievant wanted fired.

Before proceeding to review the seven Written Notices, the witness identified Agency Exhibit 19 as the Contract Administrator guidelines which were provided to the Grievant by email from Grievant's supervisor dated April 22, 2022.

In concluding the testimony of the first witness, the witness reviewed each of the seven written notices, being Agency Exhibit 2, the first Written Notice issued July, 2022 and Agency Exhibits 44, 46, 51, 53, 55 and 57 each being issued on November 22, 2022. The witness testified that as to Agency Exhibit 57, Written Notice, Group III with termination for including a sexually explicit photograph in the Grievant's emailed response to the Grievant's performance evaluation, for that behavior alone the Grievant should be terminated.

In response to a question from Grievant's Attorney the witness stated that the witness did not ask Grievant's supervisor (the subject of the sexually explicit photograph) why the supervisor was on the Grievant's social media page. Grievant's Attorney also suggested that addendum at page 23 of Agency Exhibit 10 was not part of the Annual Performance Review which was provided to the Grievant. In addition, the witness did not dispute that the Grievant was deemed a "contributor" in his annual performance review for 10/25/20-10/24/21 and his Mid-Year Performance Review 10/25/21-4/30/22 (Agency Exhibits 10 and 13). Grievant's Attorney further pointed out that in the email from Grievant's supervisor dated August 18, 2022 (Agency Exhibit 45) that although the email mentions "(Grievant)" continued to demand I provide a response to his mid-year review response. (Grievant) insisted I write these statements to share with human resources...I will add I'm starting not to feel (un) comfortable meeting with (Grievant) alone. (Grievant) is becoming demanding and agitated if (Grievant) feels (Grievant) is not getting the answer (Grievant) would like,". No where does the email mention the Grievant raising Grievant's voice during the meeting.

The Agency's next witness was Grievant's new supervisor who testified that the transition could be a "fresh start" for the Grievant. The witness testified that despite being instructed to complete the "legacy packet" and return the PrEP phone to one of the two offices indicated, the Grievant did not follow the instructions. The witness also testified, referring to Agency Exhibit 62 regarding the details of the Grievant's job overview and duties, that there are strict guidelines and rules which must be followed regarding funding. Accordingly, the Grievant was given two contracts to monitor and allowed a few months to transition to the new team. The witness then reviewed Agency Exhibit 43 regarding emails related to the Grievant's transition tasks which emails cover the period between February 3, 2022 and June 14, 2022, primarily dealing with the contracts and the difficulties with invoice protocols. In addition, the witness reviewed Agency Exhibit 17 which included a thread of emails from February 7, 2022 to March 24, 2022 highlighting difficulty the supervisor was having with the Grievant following instructions regarding the tasks. The Hearing Officer noted that on page 4 and 5 of the Exhibit, the supervisor had emailed the Grievant on March 23, 2022 at 5:23 pm instructing the Grievant to provide details of the work Grievant had done on certain items by the next day at noon. The

next morning the Grievant responded to his supervisor ending with “If you have any other questions, do not hesitate to ask them. Questions yield answers; and with answers, the chance for understanding.” The witness testified that based on Grievant’s Exhibit 1, email 13b and email 13c, the Grievant knew the “PrEP team workplace best practices guidance requirements.” In addition, the witness testified that the Grievant was given a light forty percent workload to help during the Grievant’s transition period to the new team. However, the witness testified that Agency Exhibit 18 demonstrates the Grievant’s difficulty in complying with procedures regarding quarterly reports. The witness further testified that the material at Agency Exhibits 19-29 support the issuance of the first written notice issued on July 8, 2022.

With respect to the Contract Administrator Guidelines set out at Agency Exhibit 19, the witness testified that the Grievant was trained by the witness and would know, or should know, the importance of the procedures regarding contract renewals and modifications, routing procedures and deadlines for invoices, invoice error or discrepancy procedures, reporting deadlines regarding quarterly reports and site visits and site visit reports and the need to return calls to contractors within twenty-four hours. The witness then reviewed the emails and forms regarding site visits (Agency Exhibit 20) and the instruction that the supervisor and the Grievant would process the invoices together. The witness then pointed out that the Grievant indicated by email dated March 8, 2022 that the Grievant had gone over the contractors manual a couple of months ago (Agency Exhibit 61) and that the Grievant was reviewing the “QA Manual”. (Agency Exhibit 21, Page 4) Agency Exhibit 22 through 29 were reviewed regarding the various problems with the site visit procedures.

Reviewing Agency Exhibit 32, page 1, the witness pointed out that regarding the site visit on May 9, 2022, there was ample time for the Grievant to complete the site visit report to ensure it met the fifteen day requirement date. The supervisor pointed out that the Grievant did not have any pressing priorities, that everybody else completed within a week and that it should have taken the Grievant no more than a day or two. However, despite a deadline of May 31, the Grievant did not get anything in until June 2. (Agency Exhibits 30 through 38) In addition, the witness reviewed Agency Exhibit 39 regarding issues with Grievant’s handling of invoicing, Agency Exhibit 13 to demonstrate that the Grievant had been trained in the proper procedures and that the Grievant in Grievant’s responses to his supervisor’s observations (Agency Exhibit 13, pages 15-19) demonstrated that the Grievant challenges directives, struggles with interpersonal communication with superiors and co-workers and created excuses for not following instructions and procedures.

The witness next addressed Agency Exhibit 44, the Written Notice issued November 22, 2022, Group III with termination in which it was stated that on August 18, 2022 at Grievant’s mid-year review follow up meeting, the Grievant’s “tone of voice and body language during the meeting was insubordinate and disrespectful...you were agitated, raised your voice... Your behavior was aggressive and you raised your voice and made unreasonable and repeated demands of your manager...you demonstrated the same inappropriate behavior on August 31,

2022 during your check-in meeting with.... During that meeting you behaved in a hostile and aggressive manner and raised your voice when you were not satisfied with the response from You also made several unreasonable demands of the supervisors". While reviewing Agency Exhibit 45, a memo prepared by Grievant's supervisor summarizing what occurred at the August 18, 2022 mid-year review follow-up, the witness testified that the meeting lasted approximately thirty minutes, beginning at approximately 11:45 am. However, the witness noted that Grievant Exhibit 1 represented as a recording of the meeting was only about fifteen minutes long and speculated that the Grievant had deleted the portion recording the Grievant raising the Grievant's voice.

The witness next reviewed Agency Exhibit 46 Written Notice issued November 22, 2022 in which it is set out that on two occasions the Grievant failed to follow the Grievant supervisor's directive to schedule meeting with the supervisor to review invoices before submitting the invoices. The supervisor commented that at the check-in meeting with the Grievant on July 29, 2022 the Grievant was sarcastic in responding to the concerns expressed by the supervisor. The Hearing Officer listened to a recording of the July 29, 2022 check-in meeting. The witness proceeded to review Agency Exhibits 49 and 50 to demonstrate that the Grievant continued to process invoices incorrectly and despite being prompted to review procedures on August 18, 2022 and August 29, 2022 (Agency Exhibit 47, page 16).

The witness then reviewed Agency Exhibit 51 Written Notice issued November 22, 2022 setting out details of Grievant's failure to follow supervisor's instructions between August 26, 2022 and October 5, 2022 with the material at Agency Exhibit 52 provided as support.

The witness next reviewed Agency Exhibit 53 Written Notice issued November 22, 2022 with offense dates August 18, 2022 through August 31, 2022 regarding the Grievant's failure to follow a supervisor's instructions to complete a sample budget reallocation y deadline, failing to seek relief or an extension. Agency Exhibit 54 was reviewed in support of this written notice, with page 121 indicating that the Grievant did not submit the form until after the needed follow up meeting. Upon questioning by Grievant's attorney, the witness acknowledged the Grievant's positive contributions with Cornerstone (Agency Exhibit 42). Also, when asked by the Grievant's attorney about the fifteen day deadline, the witness stated that the majority of employees make the deadlines but that when a deadline is missed, the missed deadline is documented.

The third witness for the Agency, a "Status Neutral Contract Monitor", testified that at the August 31, 2022 check-in meeting the witness, the Grievant, and the Grievant's supervisor were present. The witness testified that the Grievant began to get upset, slapped the table with his hand ("just once") and made demands of the Grievant's new supervisor. The witness testified that the witness had never seen the Grievant behave in that manner in the past and was concerned because the Grievant's supervisor was pregnant at that time. The witness testified that regardless of the Grievant's behavior the witness agreed to become the Grievant's supervisor. The Grievant

then confirmed the information set out at Agency Exhibit 51, Written Notice issued November 22, 2022 and the support information provided at Agency Exhibit 52.

The witness next reviewed Agency Exhibit 55 and pointed out at Agency Exhibit 56, page 2, 4 and 26 that the Grievant had been provided information three times, compared to most employees receiving the information once as a guide. The witness added that a quarterly report should only take about three hours to complete.

Finally, the witness testified that on October 24, 2022 the Grievant forwarded a sexually explicit photo of the Grievant's former supervisor as part of the Grievant's response to the Grievant's performance evaluation appeal. As a result of the Grievant's conduct, the Written Notice, Group III with termination was issued (Grievant Exhibit 6).

The Agency's next witness was the Acting Director who testified that in over twenty-five years of dealing with employees, the Grievant was "the worst I have dealt with." The witness testified that the Grievant reduced the Agency nurse, (a person with thirty years of public health experience) to tears by the manner in which the Grievant challenged the nurse. The witness stated that on the first day after the Grievant's mediation the Grievant violated the terms of the mediation. Further, the witness testified that the witness was in constant contact with HR regarding the seven written notices issued to the Grievant and that mitigation was considered in issuing each of the written notices. The witness, in responding to questions from the Grievant's attorney, confirmed that the Grievant was one of the few employees who was coming into work during the pandemic, that during this time the Grievant had "consistently demonstrated a strong work ethic..." (Agency Exhibit 14) and that the Grievant was deemed a "contributor" on the Grievant's performance reviews (Agency Exhibits 9, 10 and 13).

The final exhibit for the Agency was the Grievant's original supervisor. The witness testified that the Grievant was impossible to supervise and that at the August meeting the witness heard the Grievant's raised voice from outside the meeting room, peeked in and saw the Grievant had a raised hand. And as to the explicit photograph of the witness which the Grievant included in the Grievant's email to the Grievant's then supervisor, the witness testified that the witness did not provide the photograph to the Grievant and does not know how the witness's name and number got on the photo.

The Agency having rested its case, the Grievant then testified that his contact with the Agency began in December 2014 as a private contractor. In February 2018 the Grievant became full time as a "Prep Support Specialist". The Grievant testified that beginning in January 2022 the Grievant was on what they referred to as the "dream team" but that Grievant had concerns with the Grievant's supervisor and specifically that as to Agency Exhibit 14, memorandum dated January 21, 2021 the Grievant testified that he did not know that his supervisor was trying to contact him, the basis of the memorandum alleging failure to follow a supervisor's instructions.

While much of Grievant's testimony was regarding wrongs the Grievant felt were perpetrated upon him, the Grievant responded to some of the specific allegations as follows:

1. Grievant testified that he did not return the telephone to either of the offices instructed because the Grievant felt the file room would be more secure. However, the Grievant did not deny that he had failed to advise the other two employees who needed the phone that the Grievant had placed the phone in the file room.
2. Grievant denied that the Grievant was aggressive or threatening in the August meetings and played a recording made by the Grievant which did not demonstrate Grievant's voice was raised. The Agency's attorney asserted that Grievant's recording had been altered to remove the raised voice and slapped hand. In support Agency's attorney represented that the Grievant's recording was shorter than the thirty minute duration of the meeting. The Grievant denied that the Grievant altered the recording of the meeting.
3. Grievant testified that although all other employees prepared a "task list", the Grievant's supervisor required him to do a "time study". (Agency Exhibit 17)
4. Grievant reviewed Grievant's response to the first written notice by referring to his specific responses at Agency Exhibit 1, pages 5-41.
5. Grievant referred to Grievant Exhibit 1, page 5-8 and testified that those pages were a transcript of the Grievant's recording of the follow-up meeting with the Grievant's supervisor. The Grievant asserted that the transcript does not demonstrate insubordination, aggressive behavior or combativeness.
6. Grievant admitted that Grievant made a mistake in sending page 2 of Agency Exhibit 52 which allowed each contract funds recipient to see what each of the other contract funds recipients was receiving.
7. Grievant referred to Grievant's Exhibit 4, page 37 to demonstrate that the Grievant was making notations and attempting to follow procedure and meet deadlines.
8. Grievant referred to Grievant Exhibit 5, page 4 to demonstrate that the Grievant was attempting to meet quarterly report deadlines.
9. Grievant explained that Grievant included the sexually explicit photo of Grievant's former supervisor to demonstrate Grievant's belief that Grievant's former supervisor was harassing the Grievant through the Grievant's social media.

In response to questioning from the Agency's attorney, the Grievant admitted that the Grievant had possession of the sexually explicit photograph of Grievant's former supervisor for an extended period of time and had shared the photograph with another person before including it in Grievant's email to the Grievant's supervisor.

In closing, the Agency's attorney argued that the evidence demonstrated the Grievant's failure to follow instructions and insubordination as alleged; that the sexually explicit photograph and the Grievant's behavior in the meeting with the Grievant's supervisor each justified a Group III Written Notice and termination; that the fact that the Grievant's supervisors had deemed the

Grievant to be a “contributor” demonstrated that Grievant’s supervisors were not out to get the Grievant; and that mitigation was considered in each of the seven written notices.

In closing, the Grievant’s attorney argued that the Grievant as an employee was entitled to be immediately notified of the Grievant’s failings and could not be subject to multiple written notices issued on the same date reciting various earlier offense dates and that the written notices were issued in retaliation for the complaints filed by the Grievant.

CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer’s to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “accordance with rules established by the Department of Human Resource Management...”. Under the rules for Conducting Grievance Hearings “[a] hearing officer must give deference to the agency’s consideration in the assessment of any mitigating and aggravating circumstances. 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Agency established by a preponderance of the evidence that all of the relevant policies, standards and written directives were in force as alleged and the Grievant was aware or should have been aware of all the said policies, standards and written directives.

Considering each of the Written Notices, the Hearing Officer concludes as follows:

1. Written Notice, Group II, issued July 8, 2022 (offense dates 1-15-21-7/18/22). The Agency proved by a preponderance of the evidence insubordination. The decision to charge as a Group II with a five day suspension is consistent with law and policy. Mitigation was considered by the Agency.
2. Written Notice, Group III, issued November 22, 2022 (offense dates 8/18/22 & 8/31/22). The Agency proved by a preponderance of the evidence disruption of the workplace with aggressive and abusive behavior. The decision to charge as a Group III with termination of employment is consistent with law and policy. Mitigation was considered by the Agency.
3. Written Notice, Group II, issued November 22, 2022 (offense dates 6/14/22-9/26/22). The Agency proved by a preponderance of the evidence disruption of the workplace. The decision to charge as a Group II with termination of employment is consistent with law and policy. Mitigation was considered by the Agency.
4. Written Notice, Group II, issued November 22, 2022 (offense dates 8/26/22-10/5/22). The Agency proved by a preponderance of the evidence disruption of the workplace. The decision to charge as a Group II with termination of employment is consistent with law and policy. Mitigation was considered by the Agency.
5. Written Notice, Group II, issued November 22, 2022 (offense dates 8/18/22-8/31/22). The Agency proved by a preponderance of the evidence failure to follow instructions and insubordination. The decision to charge as a Group II with termination of employment is consistent with law and policy. Mitigation was considered by the Agency.
6. Written Notice, Group II, issued November 22, 2022 (offense dates 10/31/22-11/3/22). The Agency proved by a preponderance of the evidence intentional disrespect. The decision to charge as a Group II with termination of employment is consistent with law and policy. Mitigation was considered by

- the Agency.
7. Written Notice, Group III, issued November 22, 2022 (offense date 10/24/22). The Agency proved by a preponderance of the evidence failure to follow policy regarding electronic communications and disrespectful behavior. The decision to charge as a Group III with termination of employment is consistent with law and policy. Mitigation was considered by the Agency.

In reaching the Hearing Officer's conclusions and decision, the Hearing Officer gave consideration to the arguments of the parties' attorneys.

DECISION

For the reasons stated herein, the Agency's issuance of each of the Written Notices and discipline imposed is upheld as consistent with law and policy and may not be mitigated under the record evidence in that the discipline does not exceed the limits of reasonableness.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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.

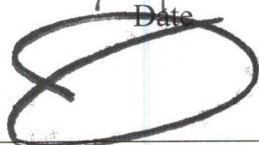
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to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

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

ENTERED: 4/13/2023

Date



John R. Hooe, III
Hearing Officer

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