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. 11895

Hearing Date: May 3, 2023
Decision Issued: May 8, 2023

PROCEDURAL HISTORY

On May 11, 2022, Grievant was issued a Group II Written Notice of disciplinary action. The offense was failing to follow instructions and/or policy, including Department of Corrections Operating Procedures 135.1 and 135.2, and DHRM policy 1.60.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 6, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On May 3, 2023, a hearing was held in person at the Grievant's facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits, as numbered. At the hearing, the Grievant moved documents described as character references into the record, but the documents were rejected as untimely. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

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 Operating Procedure 135.1, *Standards of Conduct*, provides, among other things, the expectation that employees

> [c]reate and maintain a Healing Environment within the DOC by treating coworkers, supervisors, managers, subordinates, inmates/probationers/parolees, and other stakeholders with respect, courtesy, dignity, and professionalism; be open to communications and collaboration with colleagues in a manner that generates trust and teamwork.

Agency Exh. 21, p. 7. A Group II offense includes acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant termination. These offenses include failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure. *Id.*, p. 15. A Group II Written Notice may include up to 10 workdays disciplinary suspension without pay. *Id.*, p. 16.

The Agency's Operating Procedure 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*, provides, among other things, the expectation that employees

> [e]xercise professional conduct when dealing with offenders to ensure the security and integrity of the correctional process and to promote a Healing Environment within the DOC.

Agency Exh. 22, p. 3. Further, the policy requires

> [w]hile performing their job duties, employees must model a professional, healing, and supportive relationship when interacting with persons under DOC supervision, which involves respecting the rights of offenders as individuals, acting in a trustworthy and responsible manner, helping and supporting offenders and other staff members to the extent possible and ensuring that the employee's conduct does not harm others.

Agency Exh. 22, p. 4.

The Offense

The Group II Written Notice, issued by the Agency warden on May 11, 2022, detailed the facts of the offense, and concluded:

> On Thursday, March 10, 2022, Inmates [D.C.] and [T. P.] had an argument in 3D. While the inmates were in the wing arguing, Unit Manager [Grievant] admitted that she told Inmate [T.P.] that she had "every right to fuck her up if she puts her hands on you" (referring to Inmate [D.C.]). This type of behavior is unbecoming of a Corrections professional and is a violation of DOC Operating Procedure 135.1, *Standards of Conduct.* a violation of DOC Operating Procedure 135.2. *Rules of Conduct Governing Employee Relationships with Offenders,* and a violation of DHRM Policy 1.60, *Standards of Conduct*.

Agency Exh. 1. For mitigating circumstances, the Agency noted:

> Unit Manager [Grievant] has been with the DOC since 2011 and has received "Exceeds Expectations" on her 2020 and 2021 performance reviews. [Grievant] has been with the DOC since June 2011, she was promoted to Sergeant at FWCC in November 2013, and was promoted to Lieutenant in 2016. In August 2020 she performed both the LT and UM duties in HU3 as her UM was out and retired in October 2020. During this time, she was also performing Watch Commander duties, as needed.

Agency Exh. 1. The written notice included no other disciplinary action.

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 a Unit Manager, charged with the safety and security of inmates. The Grievant admitted the conduct charged and conceded the conduct was a violation of policy and expectations. The Grievant, however, asserted that her discipline was harsher than that levied on others for even worse conduct. The Grievant, however, did not present any specific evidence of disparate treatment compared to other instances of misconduct. The Grievant also asserted that the discipline was motivated by retaliation.

The Grievant established that the original discipline for this offense was a Group II Written Notice, issued May 6, 2022, with a demotion and transfer, erroneously based on the accumulation of two active Group II Written Notices. Agency Exh. 2. The Agency's record showed an active Group II Written Notice from 2019. The Grievant was adamant that the 2019 Group II Written Notice was, in fact, rescinded, and presented copies of documents supporting her contention to the Agency. The testifying Human Resources Officer stated that the matter was researched promptly, confirming the Grievant's contention, and that the current Written Notice was reevaluated, and a corrected Group II Written Notice was issued removing the disciplinary demotion and transfer.

The Grievant testified that she was transferred for two days to another facility before the matter was corrected, and this caused her embarrassment and anguish, as it became known to her work colleagues. The Grievant asserted this error by the Agency demonstrated hostility and retaliation against her.

All of the Agency witnesses testified that the Group II level of discipline was appropriate for the offense admitted by the Grievant.

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 by a preponderance of the evidence the misconduct of the Group II Written Notice.

The Grievant's evidence and testimony establishes the essential facts of the offense. The offense falls squarely within the scope of a Group II Written Notice as violation of policy and expectations. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group II Written Notice. The Agency conceivably could have imposed lesser discipline, but its election for a Group II Written Notice, without suspension, 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 Grievant's misconduct was mitigated based on her otherwise good and commendable work record. The Group II Written Notice carried no suspension.

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.

While the Grievant asserted disparate treatment, there is insufficient evidence of another situation or similar offense of similarly situated employees treated differently or more leniently. The Grievant has 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.

Likewise, the Grievant's assertion on the erroneous initial discipline based on two active Group II Written Notices does not establish retaliation. While certainly a regrettable error by the Agency's disciplinary recordkeeping system, there is no evidence of any intentional act or harm by the Agency against the Grievant, and the error was corrected relatively promptly. The resulting Group II Written notice conceivably could have included suspension, but it was issued without any permissible suspension. The Grievant suffered a short-lived wrong from the disciplinary mistake, but such circumstance does not establish retaliation or other ground for relief from the discipline.

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 II Written Notice, with no suspension, 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.

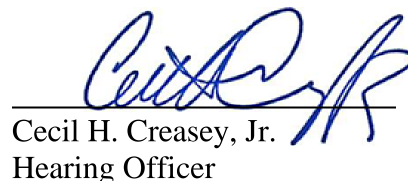
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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]

[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

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