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. 11952

Hearing Date: May 4, 2023
Decision Issued: May 26, 2023

PROCEDURAL HISTORY

On February 16, 2023, Grievant was issued three Written Notices of disciplinary action, with job termination based on accumulation of Written Notices. The offenses were (a) Group I for unsatisfactory job performance, (b) Group II for failure to follow instructions or policy, and (c) Group II for failure to follow instructions or policy.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 5, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On May 4, 2023, a hearing was held in person at a mutually agreed location.

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. The parties entered into 17 written stipulations of facts. Grievants Exh. 23. Following the hearing, both sides were permitted to file post-hearing briefs by May 19, 2023, and their briefs, dated May 19, 2023, were received and 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 Notices?
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."

DHRM Policy 1.60, *Standards of Conduct*, requires employees, among other things, to:

- Report to work as scheduled and seek approval from the supervisor in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.
- Perform assigned duties and responsibilities with the highest degree of public trust.
- Devote full effort to job responsibilities during work hours.
- Meet or exceed established job performance expectations.
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 28, pp. 4 and 5.

A Group I offense includes acts of minor misconduct that require formal disciplinary action. Examples include tardiness; poor attendance; and unsatisfactory work performance. The Standards of Conduct, Agency Exh. 28.

A Group II offense includes acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. Examples include failure to follow supervisor's instructions; leaving work without permission; and failure to report to work without proper notice/approval. The Standards of Conduct, Agency Exh. 28.

Absent mitigating circumstances, job termination may result from two Group II level offenses.

DHRM Policy 1.61, *Teleworking*, provides

> If telework is approved, assignment of telework does not change the conditions of employment or required compliance with policies. Approved telework

agreements may be superseded when an employee is notified by their supervisor of activities that require an employee to work on-site.

Agency Exh. 33.

Agency Policy 105, *Hours of Work and Leaves of Absence*, provides

IV. PROCEDURES

A. Working Hours
1 Customer service hours for the office are from 8:30 a.m. to 5 p.m., Monday through Friday, except holidays.
2 Supervisors are not required to approve alternate work schedules. However, with the approval of the respective [deputy], they may establish staggered work hours and alternate work schedules for employees, provided the customer service hours are met and adequate operational coverage is maintained.
a. To the extent possible, employee preferences should be weighed in the establishment of staggered work hours or alternative schedules; however, operational needs dictate all scheduling arrangements.
b. Supervisors should adjust schedules as necessary to provide appropriate operational coverage.

Agency Exh. 32.

The Offenses

The Group I Written Notice, issued by the Agency chief deputy on February 16, 2023, detailed the facts of the offense, and concluded:

> **Unsatisfactory Job Performance** – On Friday, February 3, 2023, you did not send the required advance notice for a FOIA request as required by OSIG Policy 120, Virginia Freedom of Information Act (FOIA), until it was noted by me. This instance involved The Los Angeles Times and a high-profile case and as such, the OSIG agency head made a phone call to the affected agency to apologize, where it was then noted that the subsequent notice was sent to an incorrect email address.

Agency Exh. 4. The Agency found mitigating circumstances weighed against a Group II offense for failure to follow instructions or policy: length of state service, previous job performance, and work contributions.

A Group II Written Notice, issued by the Agency chief deputy on February 16, 2023, detailed the facts of the offense, and concluded:

> **Failure to Follow Instructions or Policy** – On Wednesday, January 18, 2023 and Tuesday, January 24, 2023, it was discussed that full in-person office coverage would be required by your unit during the business hours of 8:30 am to 5:00 pm. However, on Friday, February 3, 2023, you worked from home even though you had previously approved your subordinate employee's leave which left no in-person office coverage for the entire workday.

Agency Exh. 5. The Agency found mitigating circumstances (as stated above for the Group I Written Notice) weighed against permitted suspension for a Group II Written Notice.

The second Group II Written Notice, issued by the Agency chief deputy on February 16, 2023, detailed the facts of the offense and concluded:

> Failure to Follow Instructions or Policy – On Wednesday, January 18, 2023 and Tuesday, January 24, 2023, it was discussed that full in-person office coverage would be required by your unit during the business hours of 8:30 am to 5:00 pm. However, after returning from a meeting on February 8, 2023 at 4:20 pm, I noticed that your door was closed, there was no approved leave on your calendar and you had clearly left for the day. As a result of you leaving prior to 5:00 pm, the office did not have the required in-person office coverage.

Agency Exh. 6. This Written Notice included job termination based on the accumulation of written notices. For circumstances considered, the Agency stated on the Written Notice that the behavior has shown a complete disregard for the chief deputy's instructions related to office coverage. Thus, no further mitigation was deemed warranted.

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 since 2019 as director of communications, without prior active disciplinary actions. The Agency witnesses testified consistently with the facts asserted in the Written Notices. The Agency's human resources manager testified that the Agency properly identified the misconduct and issued appropriate discipline, accordingly. While the Agency is encouraged to follow progressive discipline, it is not required to do so within its discretionary management. The Agency's chief testified that the Grievant's FOIA mistake was serious, and that the required in-person office coverage was a priority. The purpose of the Agency is to investigate waste and identify inefficiencies in executive branch state government. The Agency's chief deputy, the Grievant's direct supervisor, testified to the facts of the Written Notices. The chief deputy testified that the FOIA mistake was an egregious error, and that the Grievant expressed that the in-person office coverage was neither necessary nor important. As for the Agency's telework policy, while the Grievant could make use of the telework policy, the needs of the Agency trump the telework flexibility. Both the chief and deputy chief testified that the Grievant had been a valuable contributor to the Agency.

The Grievant did not refute the facts of the Written Notices, but she did offer testimony that minimized the misconduct and the effect on the Agency. Regarding the FOIA error, the

Grievant testified to the contemporaneous incident at the Agency regarding a threatening caller, but another employee was primarily involved in reporting the disruptive event to police, etc. The Grievant also emphasized the stipulation that when her unit's in-office coverage lapsed, the supervisor did not formally assign other in-office staff to cover the in-person tasks. Grievant's Exh. 23, No. 14. The stipulations also establish that in-person office coverage was never explicitly included in the Grievant's employee workplan (EWP). *Id.*, at No. 10.

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. 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 notices. 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 three Written Notices.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notices. The Grievant's evidence and testimony establishes the essential facts of the offenses. The offenses fall squarely within the scope of Group I and Group II Written Notices, as issued. Accordingly, I find that the Agency has met its burden of showing the Grievant's misconduct as charged in each Written Notice. Although the three Written Notices were issued on the same day, there is no prohibition on agencies from such disciplinary practice. The Agency conceivably could have imposed lesser discipline, but its election for the Group I and two Group II Written Notices, with termination, is within its discretion to impose progressive discipline.

Thus, without a finding of overriding mitigating circumstances, 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 it did not issue the most severe discipline for each Written Notice, although the Agency elected termination based on the accumulation of discipline.

Given the nature of the Written Notices, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline, especially in light of this Agency's purpose is investigating waste and identifying inefficiencies in executive branch state government. 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 two Group II Written Notices. 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, while the Group I Written Notice was not from intentional conduct, the two Group II offenses were wholly within the Grievant's intentional behavior.

The Grievant had a good 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, but there is no evidence of a similarly situated employee being treated differently for similar misconduct. Without evidence of such circumstances, I cannot conclude disparate treatment was applied. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

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

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the Written Notices and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, for the reasons stated herein, the Agency's Group I Written Notice and two Group II Written Notices, 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]

[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.