

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

DIVISION OF HEARINGS

In the matter of: Case No. 11877

Hearing Officer Appointment: October 5, 2022
Hearing Date: March 14, 2023
Decision Issued: March 27, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance on June 3, 2022, of a Group II Written Notice (for violations of Written Notice Offense Codes 56 <insubordination> and 13 <failure to follow instructions or policy>) by the Virginia Commonwealth University (“VCU” or the “Department” or the "Agency").

The Grievant, the Agency’s attorney and the hearing officer participated in a first prehearing conference call at 10:00 am on November 10, 2022. The parties all agreed that email is acceptable as a sole means of written communication.

The hearing was initially scheduled for December 16, 2022, but after the Grievant contracted COVID, the hearing officer found just cause for granting the Grievant’s motion for a continuance. Accordingly, the parties agreed to continue the hearing to March 14, 2023.

The Grievant has raised the issues specified in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including removal of the Written Notice.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the

circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant represented herself and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-28 in the Agency's white exhibit binder and the Grievant's exhibits contained in a black binder.¹

APPEARANCES

Representative for Agency
Grievant
Legal Counsel
Witnesses

FINDINGS OF FACT

To the extent the Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Patrol Officer in the VCU Police Department. AE 10 at 1.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are designated GE followed by the exhibit number.

2. The Grievant has been employed by VCU as a law enforcement officer for 8 years. As a sworn law enforcement officer at VCU, Grievant has the authority to carry and discharge a weapon, arrest citizens and take away their liberties, and testify under oath in court.
3. As a law enforcement officer, the Grievant is charged with maintaining public trust and public safety. The Grievant is required to consistently use good judgment in enforcing laws and regulations, and to ensure that actions taken are appropriate for the circumstances.
4. According to the Grievant's job description, she was required to "provide a safe and secure learning, living, and working environment for the students, faculty, staff, and visitors of VCU through the development of various community based crime prevention strategies and initiatives in conjunction with traditional law enforcement and progressive community policing practices." AE 10 at 1.
5. The Grievant is to "provide patrol operations and services within the VCU Police Department; interpret and institute VCUPD's mission statement, **successfully handle assignments issued by the Sergeant, Lieutenant, and or Captain.**" *Id.* (Emphasis supplied)
6. In short, as a law enforcement officer, the Grievant was expected to exhibit exemplary judgment, conduct and ethics and to ensure that all applicable laws, Agency policies, guidelines, practices and rules were followed.
7. Of course, following the chain of command by officers is essential to the proper functioning of any Police Department.

8. The Grievant received significant training concerning her position and the Grievant also had significant experience as a law enforcement officer with VCU.
9. On April 11, 2022, the Grievant voluntarily signed up for an overtime assignment on May 14, 2022, to work the shift from 6:00 AM to 2:00 PM.
10. Grievant's assignment was confirmed by both e-mail and text message to her.
11. Grievant's overtime assignment concerned the VCU Spring Commencement Ceremony, one of the busiest times on VCU's calendar.
12. On May 13, 2022, the Grievant, by email, informed the Assistant Chief of Police that she was unaware that she was scheduled to work on May 14. The Grievant concluded her e-mail by saying "With all due respect Chief, I will have to accept the consequence for my unavailability on 05/14. I do sincerely apologize for this. I honestly do." AE 23.
13. The Assistant Chief responded by email at 10:47 am on May13, 2022:

"[Grievant],

Thank you for responding back. I apologize for the delay, as I am just getting to some follow-ups. I do understand your perspective. I have thoroughly looked into this matter and you signed up for the assignment in Off Duty Blue. Therefore, I am directing you to work the 5/14 assignment."

AE 23.

14. Grievant responded at 1:11 pm the same day:

"Chief,

I respect you and your direction, however, I will not be present during tomorrow's graduation ceremony. I need to take care of myself this weekend. I understand what this communicates and I am willing to accept that. If need be, I will also rescind my pending application for sergeant, due to the circumstances. I expect to see you in the near future.

Respectfully,
[Grievant]”

AE 23.

15. The Grievant did not show up on May 14, 2022, for the overtime assignment which she volunteered to work.
16. The Grievant did not follow the Assistant Chief’s clear, direct orders.
17. The Grievant’s failure to report as clearly and unequivocally ordered by the Assistant Chief materially and adversely impacted the Agency’s mission and operations.
18. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
19. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
20. The Department’s actions concerning this grievance were reasonable and consistent with law and policy.
21. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating,

discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

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

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). AE 3. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

EDR Case Number 9240 states, “The Agency may consider any unique impact that a particular offense has on the department, and the fact that the potential consequences of the performance or misconduct substantially exceeds agency norms.” Trust, accountability, honesty and judgement these are important policy considerations for an Agency like VCU and particularly in the Police Department.

The Grievant's disciplinary infractions were reasonably classified by management as a Group II offense. Failure to follow instructions and/or policy is listed in the SOC as a Group II offense and a second Group II “normally results in discharge.” AE 4. Similarly, insubordination as exhibited here by Grievant, which undermines the Agency core values and severely impacts the Agency’s activities, is appropriately classified by management as at least a Group II offense.

The Rules of Conduct of VCU’s Code of Conduct provide in part:

“01. AUTHORITY OF ORDERS/ INSUBORDINATION - Officers and members shall promptly obey all lawful orders issued to them by supervisors of a higher rank. This includes orders relayed from a supervisor by an officer of the same or lesser rank. Unjustified bypassing of rank in the chain-of-command or the non-exigent circumvention of the chain-of- command may constitute insubordination.

02. ISSUING LAWFUL ORDERS - Any order in keeping with the performance of any duty prescribed by law and by these rules and regulations, or for the preservation of good order, efficient and proper discipline, and which does not conflict with standing laws and ordinances shall be construed as lawful. Department supervisors shall not knowingly or willfully issue any order in violation of a law, rule or order of the United States, Commonwealth of Virginia or the VCU Police Department.”

AE 4.

The Standards of Conduct DHRM 1.60 require that employees,

- **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.
- Maintain the qualifications, certification, licensure, and/or training requirements identified for

their positions.

- **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.
- **Support efforts that ensure a safe and healthy work environment.**
- Utilize leave and related employee benefits in the manner for which they are intended.
- Resolve work-related issues and disputes in a professional manner and through established business processes.
- **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.
- Obtain approval from supervisor prior to accepting, initiating, or continuing outside employment.
- Obtain approval from supervisor prior to working overtime, if non-exempt from the Fair Labor Standards Act (FLSA).
- **Work cooperatively to achieve work unit and agency goals and objectives.**
- **Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.**

(Emphasis supplied) AE 3 at 4.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations rose to the level of at least one Group II offense.

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency, and did in fact mitigate the discipline and related sanctions.

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

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary

action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B).

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

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

1. the demands of the Grievant's job and work environment;
2. the Grievant's good job performance leading up to the discipline and lack of prior formal discipline;
3. the effect of the COVID-19 pandemic;
4. the Grievant's health issues; and
5. the length of the Grievant's service to the Agency.

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

relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the policy is important to the proper functioning, appearance and reputation of the Agency, and the Grievant held a position of trust where management of necessity relied on her to perform her duties in strict conformity with Agency policies, as she had been trained and undertaken to do. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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

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

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate

dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

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

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

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's

action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

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

Please address your request to:

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

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

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

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

ENTER 3/ 26/2023

John Robinson

John V. Robinson, Hearing Officer

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

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