



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11718 /11751

Hearing Date: March 17, 2022
Decision Issued: July 25, 2022

PROCEDURAL HISTORY

On April 21, 2021, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance, failure to follow instructions, and disruptive behavior. On May 20, 2021, Grievant filed a grievance to challenge the Agency's action. On September 14, 2021, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory performance, failure to follow instructions, and disruptive behavior. On October 12, 2021, Grievant timely filed a grievance to challenge the Agency's second Group II Written Notice.

On October 15, 2021, the Office of Employment Dispute Resolution consolidated the two Group II Written Notices into one hearing. On February 23, 2022 and March 17, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
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

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 employee 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") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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 Department of Behavioral Health and Developmental Services employed Grievant as a Program Administrative Specialist III at one of its locations. He was responsible for maintaining a data management system and related utilization review. He managed, "the production of ongoing and SSAS reports and the analysis of those reports in a way that is meaningful to the business users."¹ He began working for the Agency on January 25, 2016. Grievant's position was exempt from the Fair Labor Standards overtime pay requirements.

Grievant did not speak until the age of three and when he spoke, he spoke using full sentences. From ages eight to eighteen, Grievant communicated using Morse code. He was first in his class of electrical engineers in college.

¹ Agency Exhibit N.

In 2017 and 2018, Grievant received an “Extraordinary Contributor” rating on his annual performance evaluations. He received an overall rating of “Extraordinary Contributor” on his October 20, 2020 evaluations. The evaluation stated, in part, “[Grievant] is an essential member of [the Unit]. *** [Grievant’s] skillset as it relates to mining, querying, automating, and enduring the quality of the WaMS data is nothing short of amazing!”² On October 1, 2020, the Former Supervisor issued to Grievant an Acknowledgment of Extraordinary Contribution for his work. He was described as a “steady asset to both the Commonwealth and the Department.” The Operations Director thanked Grievant for his extraordinary service.³

Grievant reported to the Former Supervisor until December 30, 2020 when she left the Agency. He had reported to the Former Supervisor for approximately four years. Grievant began reporting to the Supervisor on January 4, 2021. The Supervisor reported to the Operations Director who reported to the Assistant Commissioner.

Beginning in February 2020, many Agency employees including Grievant began working remotely and holding virtual meetings. When Grievant met with the Supervisor, they usually met via video or audio conference.

When someone outside of the Unit wanted information, the Requestor was supposed to complete a Data Request Form identifying the information needed. The Data Request form asked the Requestor to identify if the request was New (one-time), New (ongoing), or Update Existing Ongoing Report. The Requestor was to provide a description of the request and the “Date Needed.”

The Requestor was supposed to send the DR form to the Supervisor who reviewed the request, assigned a DR number and then assigned it to Grievant or another data analyst. Grievant was to complete the report and then provide the information to the person requesting information. For a new request, Grievant was expect to complete the report in ten business days.

The DR form replaced the “T” reference system. Grievant created this system which was similar to the Dewey Decimal System to avoid confusion in terminology. The Supervisor changed the requests from T numbers to “DR” numbers to standardize the data request process. Grievant was used to using T numbers so the Supervisor continued to refer to data requests with T numbers as well as DR numbers.

The Unit had a standard operating procedure reflecting the data request process. It was marked “draft” because Unit managers were often adding tasks to or revising the process. Grievant had processed data request in accordance with the standard operating procedures.

² Grievant Exhibit p. 30.

³ Grievant Exhibit 26.

Some Requestors had data requests that did not change over time but needed to be updated with new data. The Supervisor had discretion to accept the request without having the Requestor create a new DR form. Instead, the data request was to be based on prior request forms and simply updated with new data.

On February 19, 2021, Grievant received a counseling memorandum regarding his work performance:

Following Supervisory Instructions: When requested to complete task, instructions and requests are often questioned and disputed prior to completion even with routine tasks that you have completed previously.

Communicating Inappropriately: Email communications from you have been challenging and disrespectful to your supervisor and others. You have taken conversations out of context and mischaracterize what others are communicating to you.

Timeline Response to Request: Through your communication and questioning of tasks, [work unit] had delayed implementation of report reduction but ultimately providing exactly what was asked for but delaying it through questioning and challenging the request. ***

Expectations Going Forward:

Improved Communication: It is understandable that there will be questions regarding requests. However, it is expected that once clarification and direction are provided, you will communicate in a professional manner and without sarcasm. All written communications, including emails are presented in a positive and productive way and that as previously discussed, all formal proposals and provenances represented by [the Unit] (both in written and verbal format) refrain from containing commentary or opinions but only the steps involved in accomplishing the request.

Timely Response to Requests: Requestors of data that need reports in a timely manner. As a matter of practice, we will only request clarifications to requests one time and will produce reports within the timeframes we agreed to as team.

Following Supervisory Instructions: While I am here to support you and help you to gain clarity that is needed, you need to understand that when I make requests of you they need to be completed. I am not intentionally trying to upset or frustrate you. If you need me to present information in a particular way to help you be more successful, you need to help me, help you.

Your failure to adhere to these concerns may result in formal disciplinary action under the Department of Human Resource Management Policy #1.60, Standards of Conduct.⁴

Grievant met with the HR Manager, the Operations Director, and the Supervisor to discuss the counseling memorandum. The meeting lasted for approximately 45 minutes.

On February 22, 2021, Grievant filed a grievance challenging the Counseling Memorandum. Grievant asked to report to a supervisor other than the Supervisor and Operations Director. The Agency did not rescind the Counseling Memorandum. The Agency did not grant Grievant's request to report to a different supervisor.

The Operations Director believed that when the Former Supervisor left and Grievant began reporting to the Supervisor, Grievant "changed." On March 12, 2021, the Operations Director described Grievant's work performance as "a far cry from what it was four months ago."⁵

On March 2, 2021, Grievant filed a grievance. He asked not to work for the Supervisor or the Operations Director. The Agency did not grant his request to work for a different supervisor.

Employee V was hired in March 2021 as a data analyst. This employee could complete data reports if Grievant did not have sufficient time to complete his assigned data reports. The Supervisor could transfer responsibility for one or more of Grievant's data reports to Employee V if necessary.

On March 9, 2021, the Supervisor asked Grievant to provide Employee V with a 30-minute overview of his work. Grievant refused to do so. Grievant said he was not a trainer and he felt Employee V was there to replace him. Grievant said the Supervisor should do the training. The Supervisor sent Grievant an email on March 9, 2021, "I am very disappointed that when I asked you to assist with acclimating new staff with [the Unit] and to discuss your role in a 30 minute overview that you refused to participate."⁶

On March 19, 2021, Grievant filed a grievance. He asked not to work with the Supervisor or the Operations Director. The Agency did not grant Grievant's request to work for a different supervisor.

Grievant obtained a note dated April 15, 2021 written by Dr. K stating, in part, "I do recommend workplace accommodations for Autism Spectrum Disorder."⁷

⁴ Agency Exhibit G.

⁵ Grievant Exhibit p. 8.

⁶ Grievant Exhibit p. 53.

⁷ Grievant Exhibit p. 88.

On April 15, 2021, Grievant sent the Supervisor an email stating:

I hereby request the accommodations as recommended by my Doctor for Autism Spectrum Disorder, specifically:

Telework 7:30 to 4 M – F;
Excuse from work on weekends and holidays;
Supervisor prioritize his tasks with need dates provided as opposed to due dates;
Supervisor and Requestor be available to work with him and discussed tasks else he be allowed to move on with another task.⁸

On April 28, 2021, the Supervisor sent Grievant a memorandum in response to his request for accommodation. The Supervisor granted Grievant's request to telework but advised Grievant that may be necessary "to work beyond 40 hours of the week to meet a deadline. Exempt employees are expected to work the number of hours necessary to get their jobs done." The Supervisor informed Grievant that he was expected to complete all of his assignments within the workweek, Monday through Friday within his established work hours. The Supervisor did not ask Grievant to work on holidays or weekends. The Supervisor was available to assist Grievant with prioritizing his tasks but the Agency required "due dates" because requestors needed information on a timely basis to complete their reports which sometimes had mandatory deadlines. Grievant was informed, "urgent requests are out of the supervisor's control and the expectation is that deadlines, due dates and need by time are met."⁹ The Supervisor and Requestors were available to Grievant to discuss tasks. The Supervisor informed Grievant, "[w]hile communication is essential to understand the content of the request, it needs to be noted that requestors have limited time to go back and forth regarding requests. Questions regarding the requests should be limited to clarifying regarding data fields that are needed in order to fulfill the request."¹⁰

Mr. W wanted several reports to be produced by the Unit. Several of the requests were recurring meaning that Mr. W had requested the information previously and the information only needed to be updated in a new report. He typically needed approximately 15 reports updated every six months.

On June 10, 2021, the Supervisor assigned Grievant responsibility for completing one of Mr. W's reports - DR0017, New to Waiver, data request. The Supervisor told Grievant he could continue using T numbers but should include the DR number in emails.

⁸ Agency Exhibit L.

⁹ Grievant Exhibit p. 89.

¹⁰ Agency Exhibit L.

On June 14, 2021, the Supervisor met with Grievant to discuss each of Mr. W's data requests. The Supervisor informed Grievant of the DR number assigned to each request and discussed each request. The reports were: DR0017, New to Waiver, DR0018, Age – Time on Waitlist, DR0019, Children's Waiver Residential, DR0020, Services by Region, DR0021, ISP Supplemental Data, DR0022, Integrated Localities, and DR0023, Integrated Employment Day.¹¹ The Supervisor informed Grievant that Mr. W wanted the reports done by June 30, 2021 in order to complete Mr. W's report. The Supervisor asked Grievant to determine what he could accomplish by June 30, 2021 or if he needed obtain any additional information from Mr. W.

Grievant sent the Supervisor an email about whether she had assigned DR0019 to another employee. The Supervisor told Grievant she had not assigned DR0019 to another employee but that she could do so to "take it off his plate." She asked Grievant to let her know if he wanted her to do so. Grievant did not ask the Supervisor to assign DR0019 to another employee.

On June 15, 2021, Grievant sent the Supervisor an email saying only DR0017 had a DR form and he needed DR forms for the other reports. Grievant informed the Supervisor he did not know that he could have the work done by June 30, 2021. Grievant changed the name of DR0017 to "ActiveintegratedAuthSIS" even though the Supervisor had previously asked him not to do so.

Grievant sent Mr. W an email indicating that he had a DR form for DR0017 but needed DR forms for the other reports as well as an "As of date." On June 16, 2021, Mr. W emailed Grievant to inform Grievant that the request were all "standing reports without changes." Mr. W provided the "As of Dates." The Supervisor told Grievant that the reports Mr. W wanted were the same reports Grievant had completed for Mr. W earlier in the year. She said that Mr. W does not need to complete new DR forms if the specs had not changed. The Supervisor asked Grievant what could be completed by June 30, 2021.

Grievant and the Supervisor had a one-on-one meeting on June 17, 2021. Grievant continued to say he needed new DR forms to complete Mr. W's requests.

On June 17, 2021, the Supervisor sent Grievant an email about their June 14, 2021 meeting. The Supervisor wrote, in part:

On Monday June 14 we had a successful meeting to discuss [Mr. W's] Data Requests (listed below) to match the new DR numbers assigned with the previous Task Numbers and also the due date of June 30. These requests have been completed in the past and are being asked to be re-run for a new Provider reports. On Tuesday June 15 you said you needed new DRFs. I asked that you work directly with [Mr. W] for any information you do not have. [Mr. W] said these are standing reports and do not have any changes; and [they] do not need new DRFs. *** When we met today you continued to

¹¹ The parties' evidence did not focus on DR0023.

state that you need a new request form although I said that for this request [it] was not necessary. As I mentioned before, not every situation and circumstance is the same, *** I wish for our team to be flexible in our process to meet the client's needs. *** You stated that due to having a Level 2 Notice that you had to go by a process and could not be flexible. After going back and forth and much discussion, I asked if you are able to complete the tasks as requested. You said that you are only able to complete Task DR0017 as you do not have a DRF for the other tasks.

[DR0017, DR0018, DR0019, DR0020, DR0021, DR0022]

We also discussed [Mr. H's] request (Data_Quality_ActiveNoAuth T2716) in our meeting. I asked you to explain why you were unable to complete the task as he has requested. You stated we do not have data from 10 years ago (which is true). I said I will discuss with [Mr. H].¹²

On June 17, 2021, the Supervisor sent Grievant an email:

In our meeting this morning, you said that [Mr. H] was asking for data from 10 years ago (which, as we discussed, do not have in WaMS). I talked with [Mr. H] and he said that he is only asking for the data that meets the criteria for what is available in WaMS. [Mr. H] understands that cannot provide what is not in WaMS. *** [G]o ahead and generate the report the last Authorized End Date for all individuals who have a previously authorized service in WaMS as [Mr. H] had requested.¹³

Grievant met with the Supervisor on June 23, 2021. The Supervisor asked Grievant if he understood or had questions about what was needed in Mr. W's reports. She told Grievant again that they would not require Mr. W to draft new data request forms. She confirmed that Grievant was working on DR0017. The Supervisor asked Grievant to let her know if the requests could not be completed by June 30, 2021. She asked him what was needed to determine if the tasks should be divided between him and another employee.

On June 24, 2021, Grievant sent Mr. W the completed DR0017 report. The Supervisor reminded Grievant that all the reports they discussed were due June 30, 2021. The Supervisor asked Grievant to look at his list and let her know what he could do so that she could reassign reports to another employee if necessary. Grievant responded that the first report on the list was DR0018 which needed a new DR form. Grievant sent the Supervisor's email to Mr. W and asked Mr. W to initiate DR0018, DR0019, DR0020, DR0021 and DR0022 if he wished. The Supervisor reiterated that Mr. W did not need to

¹² Grievant Exhibit p. 138.

¹³ Grievant Exhibit p. 137.

complete new DR forms for those requests and that she still needed to know what could not be completed by Grievant so she could reassign reports as needed.

On June 25, 2021, the Supervisor sent Grievant an email asking if there was one report from the list he could complete right now based on the information he already had. Grievant replied that he had no standard operating procedure to do his work and that he was under a Group II allegation so it was very difficult. Grievant said he needed a new DR form for each report.

On June 25, 2021, Mr. W sent the Supervisor an email with a copy to Grievant indicating that the remaining requests carried equal weight and priority. He wanted to know when the reports would be ready.

On June 28, 2021, the Supervisor spoke with Mr. W to let him know she wanted an extension of the June 30, 2021 due date. Mr. W agreed with the reports being provided as they were completed.

On June 30, 2021, Grievant met with the Supervisor and the Assistant Commissioner to discuss the outstanding data requests. Grievant also emailed the Assistant Commissioner claiming that he had not been assigned the data request reports until June 30, 2021. Grievant asked to work on DR0018 through DR0022 on the holiday July 5, 2021 and earn compensatory time. Grievant's request to work compensatory time was denied.

On July 1, 2021, the Assistant Commissioner asked Grievant to complete the remaining data reports by July 7, 2021. She asked Grievant to email the reports he completed each day.

On July 1, 2021, the Assistant Commissioner sent Grievant an email:

Except you didn't take the appropriate next step ... you were told you did not need the DRs for these reports by [Mr. W] and by [the Supervisor] and continue to ask for them as opposed to completing the reports. So, please complete the reports between today and close of business next week.¹⁴

On July 2, 2021, the Supervisor emailed Grievant to ask if he needed an extra day to complete the data reports since he had asked for compensatory leave. Grievant replied that he did not know and that he did not know what the tasks were. The Supervisor emailed Grievant that the tasks and time-frame are included in the prior email from the Assistant Commissioner.

On July 2, 2021, the Assistant Commissioner sent Grievant an email asking Grievant to update her on what was completed and telling him not to work on the holiday.

¹⁴ Grievant Exhibit p. 139.

On July 8, 2021, Grievant sent the Assistant Commissioner an email stating:

DR0017 Complete
DR0018 Complete
DR0019 DR Spec received 7/8 9:32 a.m. so that is my StartDate
DR0020 Complete
DR0021 T2748 in Progress
DR0022 Complete¹⁵

On July 8, 2021, The Assistant Commissioner asked Grievant when he would have DR0019 and DR0021 completed. On July 9, 2021, Grievant said the turnaround time for data requests was ten days according to the standard operating procedures.

On July 9, 2021, Grievant wrote that he was scheduled to be off on that day. The Assistant Commissioner sent Grievant an email that he was expected to have the two remaining data reports done by July 14, 2021. Grievant completed those data reports by July 14, 2021.

On July 9, 2021, Grievant obtained a note from Dr. K indicating Grievant had undergone neurocognitive and psychological testing and diagnosed with ADHD-inattentive type and Autism Spectrum Disorder. Dr. K recommended that Grievant be provided with a written list specifying leadership/chain of command authority, a standard operating procedure manual and be excused from working on weekends and holidays. Dr. K also recommended, "requests for task completion be provided in writing, and that the patient be afforded the opportunity to follow-up and ask questions regarding clarification of tasks assigned."¹⁶

On July 28, 2021, the HR Manager spoke with Grievant and sent Grievant an email notifying Grievant of the supervisors in his chain of command. Grievant was advised he could ask follow-up questions regarding clarification of tasks and that he would be notified if there was a need for him to work more than 40 hours per week. He was reminded that working more than 40 hours and on weekends and holidays was not typical. He was advised that his request for standard operating procedures would be finalized by the Operations Director.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹⁷ Group II offenses "include acts of misconduct of a more serious

¹⁵ Grievant Exhibit p. 143.

¹⁶ Agency Exhibit O.

¹⁷ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.”

Failure to follow a supervisor’s instruction is a Group II offense.¹⁸

Group II Written Notice, April 21, 2021¹⁹

On February 19, 2021, Grievant was instructed:

Following Supervisory Instructions: While I am here to support you and help you to gain clarity that is needed, you need to understand that when I make requests of you they need to be completed. I am not intentionally trying too upset or frustrate you. If you need me to present information in a particular way to help you be more successful, you need to help me, help you.

On March 9, 2021, the Supervisor asked Grievant to provide Employee V with a 30-minute overview. Grievant refused to do so. Grievant was notified by the Counseling Memorandum of his obligation to comply with the Supervisor’s instructions. Grievant failed to comply with the Supervisor’s instructions thereby justifying the issuance of a Group II Written Notice.

Grievant argued that he did not refuse to comply with the Supervisor’s instruction and was ready to provide the overview to Employee V. The evidence does not support Grievant’s assertion. The Supervisor’s testimony was credible and confirmed by an email she sent to Grievant following his refusal to provide an overview to Employee V.

Grievant argued the Agency issued the Group II Written Notice without first engaging in progressive discipline. The evidence showed that the Agency engaged in progressive discipline by issuing Grievant a Counseling Memorandum on February 19, 2021. When Grievant failed to comply with that counseling, the Agency took disciplinary action.

Grievant argued that the April 21, 2021 Group II Written Notice was issued in relation because he filed several grievances in March 2021. The evidence showed that the April 21, 2021 Group II Written Notice was issued because of Grievant’s work performance and not as a form of retaliation.

¹⁸ See, Attachment A, DHRM Policy 1.60.

¹⁹ The Agency made numerous allegations based on Grievant’s emails but only provided some of those emails. In addition, the Agency’s Written Notice applied to the time period of February 19, 2021 to March 31, 2021 yet it presented evidence of Grievant’s behavior prior to that period as a basis for the April 21, 2021 Group II Written Notice. The Hearing Officer disregarded that evidence.

Group II Written Notice, September 14, 2021²⁰

On February 19, 2021, Grievant was instructed:

Timely Response to Requests: Requestors of data that need reports in a timely manner. As a matter of practice, we will only request clarifications to requests one time and will produce reports within the timeframes we agreed to as team.

On June 14, 2021, the Supervisor met with Grievant and discussed DR0017, DR0018, DR0019, DR0020, DR0021, and DR0022. The Supervisor told Grievant the reports were due June 30, 2021. The Supervisor asked Grievant to inform her if he was unable to complete the reports by the due date. In particular, the Supervisor asked Grievant if he wanted her to assign DR0019 to another employee. The Supervisor would have considered assigning some of the reports to another employee if Grievant had indicated he needed assistance. Grievant did not say he needed assistance. Grievant did not meet the June 30, 2021 deadline for DR0018, DR0019, DR0020, DR0021, and DR0022. Grievant had not presented sufficient evidence to show he was incapable of meeting the June 30, 2021 deadline. Grievant had completed the reports in the past and was simply to update the information.

On July 1, 2021, the Assistant Commissioner gave Grievant a second deadline to complete the data reports. As of July 8, 2021, Grievant had not completed DR0019 and DR0021. Only after being given a third deadline of July 14, 2021 did Grievant complete all of the data requests for Mr. W.

It appears Grievant may have delayed completing the reports because he did not have new DR forms even though the Supervisor instructed him several times that new DR forms were not necessary. Moreover, it appears Grievant engaged in the same behavior giving rise to the Counseling Memorandum, namely:

Timeline Response to Request: Through your communication and questioning of tasks, [work unit] had delayed implementation of report reduction but ultimately providing exactly what was asked for but delaying it through questioning and challenging the request.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Accordingly, the Agency's decision to remove Grievant must be upheld.

²⁰ The Agency presented evidence regarding a data request made by Mr. H. That evidence is not sufficient enough for the Hearing Officer to conclude Grievant acted contrary to the Counseling Memorandum regarding Mr. H's request.

Grievant asserted that he learned of DR0019 on March 4, 2021 but that it was assigned to another employee on May 19, 2021. He asserts that his start date for DR0019 was July 8, 2021. The evidence showed that on June 14, 2021, Grievant knew of his responsibility to complete DR0019 by June 30, 2021. He did not ask the Supervisor to assign DR0019 to another employee even though the Supervisor asked Grievant several times if he needed assistance.

Grievant's Disability

Grievant has established that at least as of April 15, 2021, the Agency was aware that he had the disability of Autism Spectrum Disorder. The Agency was obligated to accommodate his disability unless the Agency could show it would suffer undue hardship. The Agency reviewed Grievant's request for accommodation and granted substantially all of his request.²¹

Grievant's disability contributed to his inability to effectively communicate and collaborate with the Supervisor and Operations Director. This inability to effectively communicate resulted in disciplinary action against Grievant. Grievant asserts that the disciplinary actions should be reversed because they resulted in part from his disability.

In *Jones v. American Postal Workers Union*, 192 F.3d 417, at *429 (4th Cir. 1999), the Court held:

The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability.

Although the Agency was obligated to accommodate Grievant's disability, a reasonable accommodation would not include reversing or reducing disciplinary action even though the disciplinary action was caused, in part, by Grievant's disability. There is no basis to reverse the disciplinary action against Grievant because of his disability.

Grievant filed several grievances seeking relief including reporting to different supervisors. The Agency could have granted this relief to avoid terminating an employee who was recently a "steady asset", "nothing short of amazing" and, an "essential member." Grievant's work performance changed after Grievant stopped reporting to the Former Supervisor. It changed because his mental health disability undermined his ability to work effectively with the Supervisor and Operations Director. Providing Grievant with a different supervisor may have restored his excellent work performance.²² The Agency was not obligated to grant Grievant's request for a new supervisor. The Hearing Officer does not have the authority to reinstate Grievant and assign him to a new supervisor.

²¹ Grievant did not seek transfer to another supervisor as an accommodation. His requests were part of his response to due process from the Agency.

²² Grievant asserted that since December 23, 2020, the Supervisor had missed 11 of 17 scheduled weekly meetings.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”²³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and 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.

Grievant’s prior work performance was exemplary. His October 2020 performance evaluation stated, “[Grievant] has completed more than 500 tasks during this cycle. This alone speaks to his level of effort and value. [Grievant’s] passion towards his work is unprecedented. This is a skill that cannot be taught”²⁴ The Agency could have mitigated Grievant’s disciplinary action based on his prior work performance. Although the Rules suggest that Hearing Officers may mitigate disciplinary action based on an employee’s work performance, the OEDR has not identified a circumstance where work performance alone is a mitigating circumstance. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of the April 21, 2021 Group II Written Notice of disciplinary action is **upheld**. The Agency’s issuance to the Grievant of the September 14, 2021 Group II Written Notice with removal 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.

²³ Va. Code § 2.2-3005.

²⁴ Grievant Exhibit p. 195.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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