

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

DIVISION OF HEARINGS

In the matter of: Case No. 11841

Hearing Officer Appointment: July 5, 2022
Hearing Date: August 17, 2022
Decision Issued: August 31, 2022

PROCEDURAL HISTORY AND ISSUES

The Grievant until recently worked in the Application Processing Unit of the Virginia Department of Health – Office of Vital Records (the “Department” or the “Agency “or “OVR”).

The hearing officer’s appointment was effective July 5, 2022.

The Grievant requested an administrative due process hearing to challenge the issuance on May 5, 2022, of a Group II Written Notice (for violations of Written Notice Offense Codes 11 and 13) by the Virginia Department of Health – Office of Vital Records (“VDH” or the “Department” or the "Agency"). The Grievant’s employment was terminated effective May 5, 2022, for accumulation of active Written Notices.

The Grievant has raised the issues specified in her Grievance Form A and is seeking varied relief, including rescission and removal of the Written Notices from her record.

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.

BACKGROUND & PRELIMINARY DECISION:

The Grievant, the Agency's attorney, the Agency's EEO/Employee Relations Specialist and the hearing officer participated in a first prehearing conference call at 10:00 am on July 13, 2022.

While discussing the scheduling of the hearing date, the Grievant was emphatic that she would only participate in a hearing if it could be scheduled on a Saturday or a Sunday, or after 7 pm in the evening. The Grievant cited as the basis for her position the fact that she had other work commitments and her frustration with what she asserted are the Agency's retaliations and deliberate delays in addressing this and her past grievances.

The hearing officer said he would be willing to schedule a hearing during the Grievant's requested time periods if the Agency consented. The Agency did not consent, and the hearing officer gave the parties the opportunity to brief him concerning his authority, or how his discretion should be exercised, in making any decision on the issue.

As agreed during the conference call, the parties were given the opportunity to present to the hearing officer, via electronic or hand delivery, any written arguments on the latter topics by 5 pm July 14, 2022. The hearing officer received and considered the parties' written arguments, which were timely made, and the hearing officer rendered his decision on this preliminary matter on July 15, 2022.

The Agency must proceed first at any hearing because the Agency bears the burden of proving, upon 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. Accordingly, this preliminary decision was not a final decision because absent a withdrawal by the Grievant, the Agency would still need to put on evidence to prove its

case and carry its burdens of production and persuasion.

Under the *Rules for Conducting Grievance Hearings* (effective July 1, 2020) (the “Rules”) and under the *Grievance Procedure Manual* (effective July 1, 2020) (the “Manual”), hearing officers are provided with broad discretion in the conduct of the impartial hearing. For example, hearing officers have the authority to:

1. Hold a prehearing conference;
2. Require the parties to exchange a list of witnesses and documents;
3. Issue orders for the appearance of witnesses at hearing and the production of documents;
4. Decide whether non-parties may attend the hearing (however, a representative of EDR may attend any hearing);
5. Record the hearing verbatim;
6. Administer oaths;
7. Admit evidence and exclude evidence, including but not limited to evidence in mitigation or aggravation of any offense charged by the agency,
8. Accept offers of proof of excluded evidence;
9. Rule on procedural requests;
10. Render written decisions on qualified grievances and provide appropriate relief; and
11. Take other actions as necessary or specified in the grievance statutes, the Manual or the Rules.

Manual at §5.7.

Concerning the scheduling of hearings, the Manual provides that “[t]he hearing must be held in the locality where the employee is or has been employed unless the parties and hearing officer mutually agree to another site. The agency must arrange a place for the hearing unless the

hearing officer chooses to make the arrangements.” Id. at § 5.2.

The Manual further requires the Agency to “make available for hearing any employee ordered by the hearing officer to appear as a witness.” Id. at § 5.3.

The sample order for state employee witnesses in the Rules provides:

Pursuant to the Grievance Procedure Manual § 5.3, the agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness. As a state employee, **the time spent at the grievance hearing will be considered work time and you will be on administrative leave** and entitled to travel expenses.
(Emphasis added)

Were the hearing officer to order a hearing outside of business hours, presumably extra expense in the form of overtime due to State employees would also attach.

Hearing officers, who essentially function as administrative law judges, do not possess the full extent of plenary powers enjoyed by State and Federal judges. This is particularly true of EDR hearing officers who do not even have subpoena power. This is noteworthy because Va. Code § 1-210(D) provides that, “[a]ny court or proceeding authorized to be adjourned from day to day shall not be required to meet on a Sunday or legal holiday.” Va. Code § 1-210(D).

Accordingly, for the above reasons and for the reasons asserted by the Agency’s counsel in her brief, the hearing officer decided that he does not have the authority to order a hearing outside of business hours, as requested by the Grievant.

Further, the hearing officer decided that to the extent that the hearing officer had such authority, he appropriately exercised his discretion, to decline to schedule such a hearing, over the objection of the Agency.

The hearing officer informed the Grievant of her right to pursue a ruling of hearing officer noncompliance from EDR pursuant to § 6.4 of the Manual. The Grievant did not do so.

Subsequently, the hearing officer's office sent the parties an email on July 18, 2022, stating in part, "[Grievant] has indicated that she is unable or unwilling to participate in the second pre-hearing conference call or hearing during normal work hours.

If [Grievant] changes her mind and wishes to participate, we ask that she please inform our office by e-mail and copy each person listed above. Accordingly, given the Grievant's decision not to participate during normal business hours, the contemplated second pre-hearing conference call will not be scheduled."

The Grievant did not respond to the above email in writing, as required, but left a voicemail at the hearing officer's office, essentially reiterating her steadfast position.

Accordingly, the hearing was scheduled and held at the Agency on August 17, 2022. The Grievant did not participate but sent many documents as proposed exhibits. Most were not relevant to the grievance hearing but Grievant's Exhibit 1 was admitted at the hearing. Agency Exhibits 1-40 were also admitted.¹

THE HEARING:

At the hearing, 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. As stated, the Grievant did not appear at the hearing.

APPEARANCES

Representative for Agency
Legal Counsel
Witnesses

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.

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as an office services specialist in OVR's Application Processing Department. AE 16 & 21.
2. As such, Grievant was required to process requests for vital records timely and accurately. *Id.*
3. Security and confidentiality of confidential information is of the utmost importance at OVR. It is the responsibility of all OVR personnel to respect and maintain the security and confidentiality of confidential information. Employees are warned that a violation of the confidentiality policy may result in disciplinary action. AE 1 at 1.
4. The Grievant received significant training concerning the need to observe and follow Agency protocols concerning confidentiality.
5. Additionally, on February 22, 2022, the Director of OVR issued a memorandum concerning "Violations of Confidentiality Policy".
6. The purpose of this memorandum was to reinforce the importance of compliance with Agency policy regarding confidentiality.
7. Classified staff, like the Grievant, were specifically warned:

"The following is provided to help employees understand what can be expected when classified OVR staff issue certificates to the incorrect party or are issued in error.

First instance in a 12 month period - up to and including written notice

Second instance within a rolling 12 month period after the first instance - up to and including Group 2 Notice.

All subsequent instances within a rolling 12 month period after the prior instance may be issued a Group 2, up to and including termination.

Mitigating factors will be taken into consideration. Employees should make every effort to not release a vital record to the wrong customer.

Disciplinary action may also include Notice of Needs for Improvement or Performance Improvement Plan. Finally, violations of such policies could contribute to a Below Contributor performance evaluation.”

AE 27.

8. On Tuesday, April 12, 2022, a customer sent an email to the Department’s Deputy Commissioner informing her that she received another customer's birth certificate with the birth certificates she requested for her children via VitalChek. The Deputy Commissioner forwarded the complaint email to OVR’s Director.
9. On Monday, April 18, 2022, a customer reached out to an employee of the Application Processing Unit and stated that she had requested a birth certificate for her child; however, she had received the birth certificate of another individual. The staff member apologized for the error on behalf of OVR and promised the customer that the correct certificate would be issued to her. The staff member also asked the customer to return the incorrect certificate. The staff member documented the conversation and forwarded the documentation to the Deputy Director of OVR.

10. On Tuesday, April 19, 2022, the Grievant's Supervisor, OVR's Application Processing Supervisor, researched the errors to determine what happened and to determine which staff member made the errors.
11. The Grievant made the errors.
12. After researching each incident, the Supervisor determined that the Grievant processed all of the certificates that had been sent out in error.
13. Previously, on Friday February 11, 2022, the Grievant received a Notice of Improvement Needed due to her inattention to detail and quality of work falling below performance standards. There were also three instances where customers had called the office to report the issuance of incorrect certificates by Grievant.
14. Grievant also received written and verbal counselings, over her 4 year period of employment by the Agency, concerning the issuance of incorrect certificates and breach of confidentiality policies.
15. On April 8, 2022, Grievant received a Group II Written Notice which she did not challenge.
16. The Grievant's disciplinary infractions concerning this case did negatively impact the Agency's reputation and operations.
17. 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.
18. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

19. 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 9. 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.

The Grievant's disciplinary infractions were reasonably classified by management as a Group II offense.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that the violations rose to the level of a Group II offense. Typically, accumulation of 2 active Group II Written Notices results in termination of employment, justifying the Agency’s decision to terminate.

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).

The Agency did consider mitigating factors, including the Grievant’s past good service to the Agency.

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.

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 Grievant's years of service to the Agency;
2. the demands of the Grievant's work environment;
3. the Grievant's good job performance and evaluations; and
4. other challenges Grievant faced in meeting work demands.

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, the Grievant was assigned an important role safeguarding confidential information and the Agency issued to the Grievant significant prior training and notice in the past. 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 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 8/ 31/ 2022

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.

Decision 8-31-22