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

DIVISION OF HEARINGS

In the matter of: Case No. 11823

Hearing Officer Appointment: April 25, 2022
Hearing Dates: July 12 & August 22, 2022
Decision Issued: September 16, 2022

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance on February 3, 2022, of (1) a Group III Written Notice and (2) a Group II Written Notice (both for violations of Written Notice Offense Codes 11, 13, 37 <disruption of the workplace>, 39, 56 and 99) by the Virginia Department of Emergency Management ("VDEM" or the "Department" or the "Agency").

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.

The Grievant, the Grievant's advocate (who is an attorney but has stressed in this proceeding he will function as, and wishes to be described as, an advocate and not an attorney), the Agency's attorney and the hearing officer participated in a first prehearing conference call at 1:00 pm on April 29, 2022.

The Grievant, the Grievant's advocate, Ms. A[1], the Agency representative, the Agency's attorney and the hearing officer participated in a second prehearing conference call at noon on June 8, 2022.

Amongst other things, the parties covered the Agency's objections to the Grievant's requests for Orders for Witnesses and Documents.

The hearing officer decided to issue all 4 witness orders requested by the Grievant. The Agency's attorney was permitted renew her objection to the materiality and relevancy of Ms. H's testimony at the hearing, if she believed it was warranted.

Some time ago, the hearing officer previously issued 2 Orders for Witnesses at the request of the Agency: for Mr. R and Ms. W. The deadline for witness and document order requests subsequently ran.

Concerning the requests for documents of the Grievant, the Agency represented that it had produced all responsive documents. Specifically, concerning the Grievant's request that the Agency produce "8. Any and all written communications between Mr. R and any Commonwealth of Virginia employee, or contractor, referencing [Grievant], including but not limited to emails", the Agency, subject to its objection that the request is overly broad, stated that after a reasonable search, it had produced all responsive documents.

The Grievant queried why the Agency had not produced certain documents from the State agency at which she was recently formerly employed, namely VITA, and from which she was transferred involuntarily. The Agency responded that it was not in possession of these records. The hearing officer stated that he does not have jurisdiction to issue orders for documents to non-parties to the grievance (and in any event the deadline for requesting orders

[1] Initials are used to preserve privacy

had run, as stated above). The hearing officer confirmed this assessment with EDR. For example, the Rules for Conducting Grievance Hearings (the 'Rules") provide, in part, "… all documents, as defined in the Rules of the Supreme Court of Virginia [Footnote omitted] relating to actions grieved "shall be made available" upon request **from a party to the grievance, by the opposing party**." Rules, Section III(E). The hearing officer recalls a case from a long time ago when he issued a document order to a non-party and was informed by EDR that it was invalid insofar as it pertained to a non-party. The Grievant was informed of her right to appeal this decision to EDR.

Pursuant to the Second Amended Scheduling Order, the hearing was scheduled for 9:00 am on July 12, 2022.

The day before the hearing on Sunday, July 10., 2022, at 6:51 pm, [redacted], counsel for the Agency, informed the hearing officer via email as follows:

"Mr. Robinson – I have just been made aware that Ms. W who is on a witness order has been admitted to the hospital. She is a key witness to one of the written notices [the Group II]. I am asking for either a continuance or that the hearing proceed but that it remain open until Ms. W can testify at a later date. We are open to either option.

In addition, the agency also wants [the Grievant] to know that it consents to a virtual hearing so that [the Grievant] and her counsel do not have to come into the office."

The hearing officer responded via email at 8:35 am on Monday, July 11, 2022, to all persons on the distribution list, including the Grievant and her Advocate:

"Good Morning [redacted]: "We have received your e-mail. **Before Mr. Robinson makes a decision, he would like to hear from the [the Grievant and her advocate].** Thank you." (Emphasis in original).

On Monday, July 11, 2022, at 9:35 am, [redacted] followed up via e-mail:

"Mr. Robinson – since we have not heard back from the grievant's counsel and the agency has witnesses travelling to town for the hearing, the agency is asking for a straight continuance so

that we can tell witnesses not to travel but need to know if you agree to the continuance. If you do, once we know Ms. W's medical and leave status we will be able to reschedule the hearing."

At 9:43 am the office of the hearing officer followed up via email with the Grievant and her advocate:

"Please be advised, that if we have not heard from you by 10:30 a.m. today, Mr. Robinson will be forced to make a Decision without your input. Thank you." (Emphasis in original)

At 10:04 am, [redacted] proposed:

"Mr. Robinson – we have another proposal. Would it be possible to proceed with just the Group III Written Notice tomorrow which just involves Mr. R who is available and proceed on the Group II at a later date? We are open to that option and believe it is the best way to proceed."

The hearing officer waited until 11:01 am and then decided:

"As witnesses have travel plans, etc. and I have issued numerous orders for witnesses, I am compelled to make a decision at this time. The hearing will go forward tomorrow on the Group III Written Notice. Any witnesses who appear may also testify concerning the Group II Written Notice if, after consultation with the party who designated them as a witness, they elect to do so. However, I will leave the evidentiary record open concerning the Group II. Witnesses with material and relevant testimony, including Ms. W once she recovers, may testify or testify again concerning the Group II, at a date and time to be decided. The testimony may be virtual or in person, at the option of the parties.

Thank you for your cooperation."

On July 11, 2022, via email at 1:12 pm, the Advocate for the Grievant stated:

"I am just now seeing the unfortunate information regarding Ms. W. [The Grievant] would like to go forward tomorrow with all other testimony, as planned. [The Grievant] is fine with Ms. W testifying at a later date, with certain stipulations. [The Grievant] would ask that Ms. W testify on a date when her witnesses are available, in case they need to testify in rebuttal. We ask that those witnesses be able to testify virtually on that date. We also ask the hearing officer to advise all parties, counsel, and witnesses, that no testimony of one witness be shared with another witness during the interim between dates."

At 1:25 pm, [redacted] responded via email:

"[Advocate for the Grievant] – just a point of clarification. The hearing officer has left open that all witnesses relating to the Group II Written Notice can testify when Ms. W testifies therefore the agency is not planning to present evidence tomorrow on the Group II Written Notice but of course you are welcome to do so according to the Hearing officer's order."

At 1:49 pm, the Grievant, via email by her advocate, changed her position:

"[The Grievant] vehemently asks the hearing officer to retract a ruling that was made without her input. There were no scheduled meetings set for yesterday or today. [The Grievant] was not required to anticipate that the employer would have a last minute emergency and required input. The 10:30 AM deadline was not part of the schedule, and we ask that it be disregarded. Respectfully, if [the Grievant] or myself needed to be reached in a timely manner, I suggest that we could have been called not be made aware of an additional input. I was not called, and I do not believe that [the Grievant] was called. We both have telephone numbers listed on the distribution sheet. It is not unreasonable for us to expect that if something needed a quick response that we would be called."

The hearing officer responded to the advocate and decided, via email at 3:12 pm:

"Please state your objections on the record at the outset of the hearing tomorrow. From your email of July 11, 2022, at about 1:12 pm, where you provide for certain conditions and contingencies on how you are willing to proceed in view of the emergency, it would appear that my decision covers most of them. Concerning the remaining item, of course, the Second Amended Scheduling Order states: "Both parties are directed to instruct these witnesses whose testimony will be taken by audio/video not to discuss their testimony with other potential witnesses until this hearing is concluded." This is also a standard instruction given to witnesses during the hearing.

[redacted]'s first email regarding the emergency was sent to you Sunday night at about 5:51 pm. While I waited until 11 am for your input, as late as I felt I prudently could, because of concern for what I understood to be witness travel plans, notifications, schedules, etc., I felt constrained to adopt the course of action reflected in my decision, while affording the flexibility to the parties in the decision and also in your email of 1:12 pm today, in an effort not to prejudice their respective positions.

Of course, you also have another avenue of redress: you can proceed to EDR for an emergency compliance ruling for hearing officer noncompliance. If you feel as strongly about this issue as you assert, I encourage you to pursue the EDR route, as I was just trying to make the best of a bad situation, precipitated by what I understand was the hospitalization of an Agency witness, for whose attendance I had issued an Order for Witness."

The Grievant attempted, unsuccessfully, to obtain a compliance ruling and the hearing officer stuck to his decision to procced with the hearing concerning the Group III Written Notice, for the reasons stated above and on the record during the hearing.

The hearing adjourned at shortly before 6 pm. The Grievant still had to testify. The Grievant had approximately 40 minutes of her allotted time available and the Agency had about 1 hour 40 minutes of time remaining. The parties agreed to continue the hearing as a virtual hearing on August 22, 2022, at 1 pm, via Zoom. On August 22, 2022, the hearing concluded after 5 pm.

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 and the Agency were represented by their respective attorney/advocate. 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 1-23 in the Agency's exhibit binder and exhibits 1-4 from the Grievant.[2]

The Grievant did not testify at the hearing.

[2] 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.

APPEARANCES

Representative for Agency
Grievant
Legal Counsel/Advocate
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as Public Safety Program Manager at VDEM. AE 1 at 1.
2. According to her Employee Work Profile ("EWP"), the purpose of the Grievant's position is, amongst other things, to "support the Support the Public Safety Communications Coordinator and the Division of Public Safety Communications (PSC) within the 9-1-1 and Geospatial Services (NGS) Bureau of VDEM to include the activities of the 9-1-1 Services Board (the "Board") as defined in the Code of Virginia." AE 8 at 8.
3. Job requirements include "[e]xtensive knowledge of public safety communications and NG9- l- 1 and E9-1-1 systems. Knowledge of current 9-1-1 industry trends and state of the art GIS technologies and capabilities. Demonstrated ability to: work independently with little to no supervision; analyze technology-related issues, develop solutions and recommend appropriate action; communicate effectively orally and in writing; draft technology-related plans, policies, standards and guidelines; **work effectively with agency management,**

state and local managers and staff, policy boards, and other, non-government groups; and work collaboratively in a team environment." (Emphasis added) AE 8 at 10.

4. Teamwork is stressed in the EWP. *See, e.g.,* AE 8 at 12:

- "Establishes and maintains respectful, cooperative and productive work relationships with subordinates and other members of the Agency.
- Forms partnerships with outside entities to further department goals.
- Values the input and know-how of others; helps and mentors others; is open to and seeks out feedback, suggestions and constructive criticism.
- Maintains big picture focus: puts the goals of the bureau/division first before own self-interest."

GROUP III WRITTEN NOTICE:

5. On October 26, 2021, the Grievant attended the Virginia APCO/NENA Interoperability Conference in Roanoke.

6. At this conference, the Grievant approached Mr. R, a new Board member, and informed him, "the Board has not been following the state code related to grants, expenses and reimbursements." AE 11 at 1 and AE 2 at 1.

7. The Grievant added that she felt Mr. R was going to be able to effect some change on the Board related to that. The Grievant told Mr. R that he needed to educate himself on the state code related to the VA 9-1-1 Services Board and that he needed to be prepared to initiate some changes related to how the Board administers grants, expenses, and reimbursements. AE 11 at 1.

8. Mr. R thanked the Grievant for her advice and retired to his room as it was late in the evening. *Id.*

9. The following morning, Mr. R ran into the Deputy State Coordinator 9-1-1 & Geospatial Services Bureau Chief (the Manager). Mr. R informed the Manager of the conversation that the Grievant had with him.

10. Having heard the Grievant's inflammatory comments that the Board had not been following the law related to grants, expenses and reimbursements, and as a new Board member of the 9-1-1 Services Board, Mr. R obviously felt a duty and responsibility to report the Grievant's revelations of unlawful behavior by the Board to the Manager. *Id.*

10. The Grievant's comments to Mr. R were false and undermined confidence in in the program and the Manager.

11. The Manager sought out the Grievant at the conference and expressed her disappointment in the Grievant's behavior.

12. The Manager instructed the Grievant to cease any further disparaging and undermining action of the Board, Board chair and VDEM agency head. Instead, the Manager told the Grievant that she should bring any future concerns regarding the Fund or the Board to the State Coordinator and/or the Manager's attention.

13. Despite the Manager's clear instructions, at an evening social event of the conference on October 27, 2021, the Grievant confronted Mr. R in the open floor space with lots of people around them.

14. The Grievant, obviously very upset with Mr. R, alleged that what Mr. R had reported to the Manager had gotten her in trouble and was possibly going to get her fired.

15. The Grievant berated Mr. R for betraying her confidence and breaching her trust.

16. As a result of these communications, Mr. R said he did not feel comfortable interacting with the Grievant as a member of the NOS team going forward.

GROUP II WRITTEN NOTICE:

17. On November 8, 2021, Ms. W, a NGS Regional Coordinator for the Agency, attended the Agency's 9-1-1 Summit and participated in a breakout session for the PSAP Grant Committee.

18. In the breakout session, the Grievant bred negativity amongst participants toward the Agency, its management and staff by pointing out potential pitfalls in the process of the program the Grievant manages.

19. The Grievant explained how she believed the process of grant amendments was allowing for an excess of funding to be slid through. This was inaccurate.

20. The Grievant falsely stated that there were no experts to evaluate the contents of quotes to make sure everything listed was required.

21. The Grievant also stated that an agency could submit unlimited amendment requests and that if all were under 10% of the total project cost, they could potentially be getting 80%. This was factually accurate.

22. However, the Grievant encouraged the committee to raise the concern because the Grievant claimed she was unable to being part of staff. The Grievant made the suggestion of only allowing one amendment request. Her overal1 presentation to

the committee was unsupportive of the grant program specific to NG911 and was very negative about the process, the Agency and its personnel.

23. The Grievant's disciplinary infractions concerning this case did negatively impact the Agency's operations.

24. 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.

26. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

27. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

28. 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.

29. The Grievant did not testify at the hearing.

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.

GROUP III WRITTEN NOTICE:

The Grievant's disciplinary infractions were reasonably classified by management as a Group III offense. The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the Agency's attorney that the offenses are appropriately classified at the Group III level with the Agency appropriately exercising the discipline. Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

This case involves, amongst other things, the recently established DHRM Policy 2.35, *Civility in the Workplace* (Effective 1/1/19) which supersedes the former Policy 1.80, Workplace Violence, and former Policy 2.30, Workplace Harassment.

As stressed in the purpose of Policy 2.35, "It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity and inclusion."

Policy 2.35 further provides:

"Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable." AE 5 at 3.

Both *Discriminatory Workplace Harassment* and *Non-discriminatory Workplace Harassment* are prohibited by Policy 2.35. Policy 2.35 defines the term *Non- Discriminatory Workplace Harassment* [Harassment not based on protected classes] as:

"Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion to a person not predicated on the person's protected class." AE 5 at 7.

As argued by the Agency's attorney[3], a single violation of DHRM 2.35 can be a Group III offense. AE 4 at 23.

According to EDR, "Policy 2.35 and its associated guidance permit agencies to assess the severity of an offense and its effect on the workplace in selecting the appropriate level of discipline. These determinations are fact-specific and subject to substantial discretion by agency management; thus, disciplinary actions are not necessarily comparable across agencies." DHRM 2021-5194.

The agency leadership convincingly testified as to the disruption of having an employee who is the Grant Program Manager disseminating falsehoods with a new Board member which would lead a reasonable person to conclude that the employee has knowledge of impropriety and that the agency, and its Board, are acting with impropriety and in violation of law. Telling a new Board member as the Grant Program Manager, "the Board has not been following the state code related to grants, expenses, and reimbursements" is a disruption of operations, violates DHRM 2.35 and 1.60 and is a serious disciplinary infraction.

In short, the Grievant's behavior undermined team, Agency and mission morale and cohesion, disrupting confidence in the Agency, its fiscal responsibility and its abilities and thereby also materially adversely impacted its operations, as evidenced, for example, by Finding ¶ 16. In short, the Grievant violated Policy 2.35 in a material and severe sense, as determined by the Agency.

The Policy Guide to Policy 2.35 provides further support for the Agency's discipline:

[3] *See,* Agency's written closing argument of September 2, 2022, at 6-13.

"The Civility in the Workplace policy defines prohibited conduct in general terms. Because all potential behaviors cannot be anticipated or listed, this guide provides some examples of prohibited behaviors but is not intended to be all inclusive…

Disciplinary actions to address prohibited behaviors may be taken on a progressive basis **or actions may be taken upon the first occurrence, depending upon the nature and seriousness of the conduct**. The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited. A "reasonable person" standard is applied when assessing if behaviors should be considered offensive or inappropriate.

Prohibited Conduct/Behaviors may include, <u>but are not limited to:</u>

…

- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest;
- Behaving in a manner that displays a lack of regard for others and significantly distresses, disturbs, and/or offends others;
- Making disparaging remarks, spreading tumors, or making innuendos about others in the workplace;

…

- Humiliating others; making public statements with the intent of embarrassing a targeted person; impugning one's reputation through gossip;

AE 5 at 10.

Furthermore, the Grievant's failure to follow her supervisor's instructions was a separate Group II offense. AE 4 at 22.

In DHRM 2020-5003, EDR held that a single Group III Written Notice is an appropriate action when the totality of the conduct demonstrates a serious policy violation.

The Hearing Officer in that case initially concluded that the Agency needed to issue a single group notice for each offense. The agency had issued a single Group III Written Notice instead of multiple Group II notices. The hearing officer reduced the discipline to a Group II Written Notice.

Reversing the hearing officer's decision, EDR wrote, "The outcome of the hearing decision, in this case, is largely driven by an underlying interpretation of policy by the hearing officer: whether the grievant's conduct should be reviewed as individual acts or collectively. The agency took the approach that it would consider the grievant's conduct collectively, resulting in a single disciplinary action. The hearing officer has determined that the Standards of Conduct policy does not authorize this approach. However, the hearing officer is incorrect in his interpretation. While the grievant's behavior could be viewed as individual acts and, therefore, assessed and disciplined separately, nothing in the policy prohibits the agency's approach here. The resulting charges in the disciplinary action at issue, in this case, are all reasonably viewed as a course of behavior by the grievant in his use of state e-mail and an agency-assigned computer, and not a collection of unrelated, distinct issues of misconduct. Accordingly, the hearing decision is inconsistent with policy."

While the Grievant argues that the Agency's discipline was unwarranted under the circumstances, the hearing officer finds, to the contrary, that Management's expectations were clearly communicated to the Grievant on multiple occasions. *See, e.g.,* AE 9 at 1, 2021 EWP: "I received complaints from three Financial Management Bureau team members in late October 2020 regarding behavior described as "aggressive" and "lashing out." I have had conversations

with [Grievant] on three separate occasions since early October 2021 regarding unprofessional behavior occurring in both public and internal meetings. This behavior has ranged from providing unsolicited and inaccurate information to confrontational."

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 III offense.

GROUP II WRITTEN NOTICE:

Similarly, concerning the Group II Written Notice, the hearing officer agrees with the Agency that the Grievant failed to comply with DHRM 1.60 and 2.35 in her actions. The Grievant reinforced a false narrative that there was impropriety in the grant funding instead of offering realistic factual information about how the Manager, Mr. C and others properly managed the funds. She should have provided factual support for the checks and balances that existed in the grant funding and shared that the expertise they were looking for was right there in the breakout session, namely Ms. W.

As shown by the Agency, the Grievant's own witnesses largely agreed that the Grievant failed to demonstrate support for the program and elevated their concerns of impropriety. *See,* Agency's Written Closing Argument at 13-19.

The disciplinary infractions were appropriately assessed by the Agency as a Group II offense. Here, not only did the Grievant's misconduct undermine the program to the committee and Board members, which caused them to unnecessarily lose confidence in the program, but it significantly distressed and offended Ms. W.

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 Grievant asserts that the discipline is too harsh. 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 job performance and evaluations;
4. the Grievant's asserted absence of intent to offend.

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 holds an important position as Program Manager and the Agency issued to the Grievant significant prior 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 each of the 2 Written Notices and the offenses specified in the Written Notices (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 actions.

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, 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.[4]

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

ENTER 9/ 16/ 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).