



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11768 / 11769

Hearing Date: September 27, 2022
Decision Issued: November 14, 2022

PROCEDURAL HISTORY

On September 24, 2021, Grievant was issued a Group II Written Notice of disciplinary action for altering telework agreements. On October 12, 2021, Grievant was issued a Group II Written Notice with removal for sharing information related to management reviews and disciplinary action.

Grievant timely filed grievances to challenge the Agency's action. The matter advanced to hearing. On November 22, 2021, the Office of Employment Dispute Resolution issued Ruling 2022-5327 consolidating the two disciplinary actions for hearing. On December 13, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for April 13, 2022 and April 29, 2022 but delayed at the parties' request. On September 27, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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 Virginia Department of Health employed Grievant as a Special Nutrition Program Manager. She had been employed by the Agency since November 23, 2013. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant supervised seven Specialists. Ms. C was one of those Specialists. Grievant reported to the Supervisor¹ who reported to the Manager.

Unit employees were all working 100 percent remotely beginning March 2020. They all wanted to continue working remotely. Several staff had school age children or ill family members and needed to know as soon as possible if they were going to have to return to the office and for the number of days.

¹ The Supervisor was not working during July 2021.

Grievant wanted to ensure that all of her employees received the teleworking preferences they desired which was full time telework. Grievant wanted employees in her Unit to know as soon as possible whether their requests for teleworking would be granted so that they could plan their work schedules and obtain assistance if needed

On July 8, 2021, the Deputy Commissioner sent staff an attachment by email describing the “roll out process for the agency new telework policy.”²

Grievant asked her employees to fill in the Telework Request and Agreement for her review.

Ms. C drafted a Telework Request and Agreement requesting full time teleworking and containing a Brief Description of Job Functions:

Compliance/Audits, Technical Assistance³

The document had a line for “Employee Printed Name and Signature.” Ms. C typed her name in block print. She dated the document as July 8, 2021.

Grievant received and reviewed Ms. C’s draft document. Grievant changed the Brief Description of Job Functions to read:

Administration of USDA’s Child and Adult Care Food Program across the Commonwealth both internally and externally through consultative, technical, and managerial services. Under the direction of the SNP Manager, this role is responsible for training, technical assistance, monitoring Program performance, facilitating Program expansion, and ensuring effective Program operation by participating institutions to maintain programmatic integrity.

The document had a line for “Supervisor Printed Name and Signature.” Grievant typed her name in block print above that line. She did not put a date next to that line. The document showed Ms. C’s signature typed in print format and typed as cursive. The line for Ms. C showed the date of July 8, 2021.

Grievant sent Ms. C’s Telework Request and Agreement to a manager for review. A person reading the document could conclude that Ms. C had signed the document containing Grievant’s description of job functions because Ms. C’s signature appeared in cursive along with her printed name.

On July 13, 2021, Unit staff held a team meeting called a “huddle.” During the meeting, Grievant said she had updated everyone’s telework agreements. Grievant said

² Agency Exhibit p. 97.

³ Agency Exhibit p. 45.

she updated wording on the forms and changed the date. Grievant said she did so in order to have everyone's telework agreements look uniform.

Ms. C did not like that her draft telework agreement had been changed without her knowledge. Ms. C asked Grievant if she could get a copy of the revised telework agreement because the document that had her signature on it was revised without her knowing and she would like to see what the updated version looked like and be prepared should someone contact her about the telework agreement. Grievant said she completed the forms for the team because it was easier to complete the agreements herself instead of sending emails. Grievant said that it would have "taken too long to receive everyone's revised telework agreement". Ms. C said she would like to know when her documents were being revised especially when her signature was on it. Grievant told Ms. C she would send Ms. C the document.

On July 15, 2021, Grievant sent Ms. C an email:

Attached please find the telework agreement that you submitted to me last week with comments pertaining to the revisions that were made, in addition to the fully revised telework agreement that I submitted to [name] for review and comments.⁴

On August 3, 2021, Ms. C notified Grievant's Supervisor that Ms. C objected to how Grievant changed the telework draft agreements. The Supervisor told Ms. C she would not share Ms. C's concerns with Grievant and Ms. C's conversation with the Supervisor would be kept confidential.⁵ The Agency began an investigation.

On August 25, 2021, the Deputy Commissioner sent staff an email reminding them that telework agreements were due no later than September 3, 2021.

On September 2, 2021 at 1:20 p.m., Ms. C sent Grievant an email regarding obtaining Family Medical Leave:

I reached out to HR yesterday to receive some information on FMLA I wanted to make sure I had this in place in case I ever needed to take me off to be with her for long periods at a time. It mentions getting information to check my eligibility for FMLA and then being forwarded information (it doesn't mention if this is something I do or you). Is this something you could assist me with?

On September 3, 2021 at 7:58 a.m., Grievant replied to Ms. C:

⁴ Agency Exhibit p. 79.

⁵ In essence, the Supervisor misled Ms. C into believing Ms. C's complaint would be kept confidential. If an employee is disciplined and appeals that disciplinary action, the Agency would not be able to keep confidential the identity of a complaining witness or the nature of the complaint.

Thanks [Ms. C] - I wish I could be more helpful, but I am not familiar with the process. On a personal note, while my grandmother was very sick and up until the day she passed (approx. 3 months) I reached out to HR multiple times RE: FMLA. I never received a response, let alone guidance. I really hope that you are more successful than I was - and if I need to light a fire, just let me know:)
Happy Friday, BTW:)⁶

On September 3, 2021 at 8:02 a.m., Ms. C sent Grievant an email:

When I reached out to [name], he sent me the FMLA Employee Guide and the VDH page on FMLA. The guide was more towards if I, the employee, needed FMLA for myself versus for a family member; the VDH page shows the process but not by "who does what" process but I am going to see what happens today when I reach back out. I will definitely keep you posted!

On September 3, 2021 at 2:02 p.m., Ms. C sent Grievant an email:

I had a meeting with [name] from HR and she was able to give me some insight into the process. This is what she mentioned:

- Have to meet qualification (employee have had to been with company for 12 months)
- Request is to be submitted through STLAR by manager/supervisor on my behalf
- Once the request is submitted, a HR Representative will send out the paperwork needed
- Paperwork is to be returned within 15 days (medical consultant has to fill out paperwork)
- Once returned to HR, HR will make adjustments in the system (if approved) to allow FMLA as a leave option

[Name] is available if you have any questions and she can guide you through the STLAR process if you need assistance. Thanks for your help!⁷

On Friday September 3, 2021, the Supervisor called Grievant at 4:47 p.m. and told Grievant that a complaint had been filed against her and that the Supervisor would be sending her an email and that the Supervisor did not want Grievant to be "blindsided."

On Friday, September 3, 2021 at 4:50 p.m., Grievant received a "DUE PROCESS MEMORANDUM" dated August 30, 2021 informing Grievant that:

⁶ Agency Exhibit p. 414.

⁷ Agency Exhibit p. 414.

A complaint was filed on Tuesday August 3, 2021, alleging the alteration of an official signed document after submission. *** On August 3, 2021, the Division Director was alerted that signed and submitted telework agreement(s) had been “revised” without prior knowledge or notification by [Grievant’s title]. *** It was stated that during the July 13, 2021 SNP team meeting, an employee was informed of her telework agreement (submitted on July 8, 2021) having been changed. The employee then request that she be supplied with a copy of the “new” agreement for her records. During the same team meeting, the employee was told by [Grievant] that she a) did not want to send the agreement to the employee, but would if she had to; b) did not have the time to send it back and would have to send everyone a copy of theirs; c) if she had to send it back and forth, then the employee would not be able to telework; and d) the employee should “trust” her. *** In essence, there are three versions of the agreement under the employee’s signature. Falsification of documents constitutes a Group III offense under the Standards of Conduct. In addition, these allegations may constitute a failure by you to uphold the Employee Standards of Conduct (DHRM Policy 1.60), specifically, and may result in the issuance of a Group III Written Notice. *** Given the seriousness of this matter, the Department is considering formal disciplinary action under DHRM Policy 1.60 Standards of Conduct, up to and including termination of your employment.⁸

After reading the email, Grievant called the Supervisor but the Supervisor did not answer. Grievant decided to send the Supervisor an email. On Friday September 3, 2021 at 6:31 p.m., Grievant sent the Supervisor an email asking for an extension of time to respond. She sent the Manager a copy of the email. Grievant had been given until 9 a.m. on Tuesday September 7, 2021 to respond. September 6, 2021 was a holiday and Grievant sought an extension of time to file to seek guidance from human resource staff, DHRM, or retain counsel before responding to the due process notice. Grievant wrote:

Please advise as to why I am receiving this document on September 3, 2021 at the close of business before a holiday weekend?

Also, prior to submitting an official response, please advise as to the extent of the investigation. In the spirit of transparency, I would sincerely appreciate knowing the tools and resources that went into said investigation, as you have given me until 9 a.m. EST on Tuesday September 7, 2021 to issue a response. ***

Under the letter and spirt of the law, I believe the accused is innocent until proven guilty, but in this specific situation, I have been denied my right to prepare an adequate defense based on the aforementioned parameters and response deadline. According to the 6th Amendment, I have the right to face my accuser of the alleged criminal act of falsifying documentation. The

⁸ Agency Exhibit p. 104.

Confrontation Clause, as it is commonly referred to, guarantees defendants the opportunity to face the accuser in the case against them and dispute the witnesses' testimony to test for truthfulness, bias, and validity.⁹

Grievant did not believe she could help Ms. C regarding Ms. C's FMLA request. On Friday September 3, 2021 at 7:34 p.m., Grievant sent Ms. C an email:

Hi [Ms. C],

Thank you very much for providing me with this additional information. I am very happy you were able to receive a direct answer. As I previously stated, you got much further than I did in my quest for FMLA guidance! As I hope you know, I am always happy and willing to assist anyone and everyone on our team, especially when it comes to advocating on your behalf.

However, with all that being said, I must respectfully request that you seek the assistance of [the Supervisor], Division Director, with regard to the FMLA process. In the spirit of transparency, the reason I am deferring to [the Supervisor] is because I was presented with a complaint against me at the close of business today that rises, according to the memorandum, to the level of possible termination of my employment with the Virginia Department of Health.

I want nothing more than to help guide you through the FMLA process, but because I was given less than one business day to submit a response to [the Supervisor] with respect to the aforementioned complaint, I am afraid I will not be able to assist you by affording your request for FMLA with the time and attention you most certainly deserve. I've included [the Supervisor] on this response so she is aware that you will be contacting her directly.

Thank you for understanding and as always, thank you so very much [Ms. C], for everything you bring to the SNP Team.

Have a lovely holiday weekend and please stay safe.¹⁰

On Monday September 6, 2021 at 8:18 p.m., Grievant send a second email to the Supervisor indicating she had not received a response from the Supervisor or the Manager about her request for an extension.

On September 7, 2021 at 8:25 a.m., the Supervisor sent Grievant an email approving Grievant's request for an extension until the "close of business on September 8, 2021."

⁹ Agency Exhibit p. 109.

¹⁰ Agency Exhibit p. 414.

On Wednesday September 8, 2021 at 5:39 a.m., Grievant sent an email to eight employees she worked with including Ms. C. Grievant wrote:

It is with such a heavy heart that I share with you that I will be out of the office through this Friday, September 10th. I will share with you that [the Supervisor] presented me with a Due Process, Group III, last Friday at the close of business.

As you know a Group III, if founded, will most likely result in termination of my employment from the Virginia Department of Health. The matter at hand is the subject of telework, both the old and the new agreements. I have been accused of malicious, unprofessional, and fraudulent activity.

Please know that I am sharing this information with you so you are aware that I am not on vacation, deliberately unresponsive or engaged in other tasks that take precedence over the team. Never in a million years would my behavior reflect any of the aforementioned excuses. ***

Lastly, my physician is involved and is responsible for removing me from work for the remainder of the week, and I have also retained counsel on my behalf. ***

This team is amazing and no other team comes close to the amount of work we crank out, the relationships we build and maintain and the fact that we are revered as a National Best Practice. I am so proud of us and I cannot tell a lie – I am going to miss you quite a bit over the next few days.¹¹

Ms. C felt hurt by Grievant's email and felt it was directed at her because she was the only one who spoke out during the July 13, 2021 team meeting. Ms. C was confused as to what was going on. She felt like she was being blamed for Grievant's health and legal problems.

On September 10, 2021, Grievant submitted her response to the Due Process Memorandum. She addressed the Agency's statement that it began an investigation August 3, 2021. Grievant said she spoke with Manager and spoke with the following team members regarding the investigation: [Mr. A, Ms. B, Ms. W, and Ms. H.] Each team member stated that neither the Division Director, nor anyone from the Office of Human Resources, spoke with them about said allegations. The SNP Manager was unable to reach [Ms. J] (on leave), [Ms. T] (vacation) or [Ms. D] (call unanswered). The SNP Manager emailed [Ms. C] requesting that she follow up with the Division Director pertaining to her concerns about FMLA. The SNP Manager provided [Ms. C] in writing with the reason for redirecting her inquiries being due to the seriousness of the allegations

¹¹ Agency Exhibit p. 116, 117.

brought forth and the time and attention required to address said allegations. [Ms. C] provided no response to the SNP Manager.

On September 24, 2021, the Supervisor sent Grievant a Due Process Memorandum alleging Grievant's behavior between September 3, 2021 and September 8, 2021 was "disruptive and created complaints of a hostile work environment with perceived retaliation."

On September 24, 2021, the Supervisor and Manager placed Grievant on pre-disciplinary leave for fifteen workdays "pending a full investigation review regarding recent actions you were engaged in." Grievant was informed:

During the time of your absence, you will not be permitted on Virginia Department of Health property without an appointment from me. In addition, you will have no contact with anyone at VDH or at facilities (except through an appointment with me) pending finalization of this investigation to include no intimidation, threats, or retaliation because of this action.¹²

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."¹³ Group II offenses "include acts of misconduct of a more serious 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."

September 24, 2021 Group II Written Notice

The Agency took disciplinary action against Grievant for:

The unprompted and unauthorized altering of seven employee 2021 telework agreement records (51) to benefit favored staff and create 100% telework eligibility for positions not eligible for such is unsatisfactory performance (11) and demonstrates questionable integrity as defined by the Code of Ethics Policy 1.03 (99).¹⁴

¹² Agency Exhibit p. 140.

¹³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

¹⁴ 51 is the offense code for "Unauthorized use of State property or records." 11 is the offense code for "Unsatisfactory Performance." 99 is the offense code for "Other (describe)."

The Agency did not establish that Grievant altered telework agreements to benefit favored staff. Grievant altered the telework agreement to benefit all of her staff and not to favor some staff over others. The telework documents were requests for full time teleworking that had to be approved by Agency managers. The Agency did not establish that Grievant was attempting to create telework eligibility for positions not eligible for teleworking. At the time Grievant submitted the draft telework agreements, all of the employees were teleworking full time. All of them were eligible to continue teleworking full time.

Grievant's actions did not violate the Agency's Code of Ethics.

When the facts of this case are considered as a whole, Grievant's behavior did not constitute more than a Group I offense for several reasons. First, Grievant had the authority to alter the telework agreements before she would consider approving them. She had the authority to insist on the revised work description even if the employees disagreed. Second, Grievant altered the telework agreements because she wanted to increase the chances that the teleworking preferences of her subordinates would be granted by Agency managers. In other words, her objective was to help and benefit her subordinates. Third, Grievant received no personal or other improper benefit by altering the documents. Grievant's behavior rises to the level of a Group I offense for failing to obtain acknowledgement of her subordinates of the changes she wanted to make to the agreements before submitting them to Agency managers. She created the appearance to Agency managers that Ms. C agreed with Grievant's revised employee work description even though Ms. C did not agree. Her behavior was unsatisfactory work performance.

October 12, 2021 Group II Written Notice

The Agency has not presented sufficient evidence to support the issuance of the October 6, 2021 Group II Written Notice. The Agency took disciplinary action against Grievant:

The sharing of information related to a management review and potential disciplinary action (99) violates VDH's Confidentiality and Code of Ethics, Policies 1.01 and 1.03 respectively. Acting in a manner that causes duress and fear of retaliation (39) violates Civility in the Workplace, VDH and DHRM Policy 2.35. These actions coupled with an overall below contributor performance evaluation for 2021 demonstrates unsatisfactory performance (11).¹⁵

State employees are free to discuss disciplinary action they received with anyone they choose unless the Agency instructs them to remain silent or there is a policy

¹⁵ 39 refers to offense code "Violation of Policy 2.35, Civility in the Workplace."

preventing them from disclosing their own disciplinary action.¹⁶ The Agency could have instructed Grievant not to discuss the August 30, 2021 Due Process Memorandum, but it did not do so. The Agency could have placed Grievant on pre-disciplinary leave and remove her access to email, but it did not do so. In other words, the Agency had the ability and authority to restrict Grievant's communication about her possible disciplinary action with her staff but it did not do so.

The Agency alleged Grievant violated VDH's Confidentiality and Code of Ethics.

VDH Policy 1.03 governs Code of Ethics. It provides:

It is the policy of the Virginia Department of Health (VDH) that each worker demonstrates the agency's Code of Ethics' Core Values and Commitments with uncompromising integrity in all aspects of their work. The Code of Ethics is the foundation for accomplishing the VDH mission, delivering public health services, and inspiring the public's trust in VDH workers. ***

Maintain confidentiality of sensitive patient and client information, employee records and other private information

Comply with agency policy and law regarding privacy, confidentiality, and inappropriate release of sensitive patient, client, employee or emergency preparedness information. Limit access to sensitive information and obtain appropriate release of information as required by law and policy.

Grievant did not disclose patient information, client information, or employee records. Grievant could determine whether her pending disciplinary action was private and she chose to disclose that information. Grievant did not violate VDH Policy 1.03.

VDH Policy 1.01 governs Confidentiality. Under this policy:

Every person has a fundamental right to privacy and confidentiality. This policy defines, identifies and establishes the key components regarding management of confidential information by VDH personnel.

This policy covers the handling of all confidential information in an effort to protect confidentiality while balancing VDH's responsibility to protect public health. This policy pertains to all oral, paper based and electronic confidential information. The specific recommended procedures related to management of confidential information are contained in a separate document identified as "Confidentiality Procedures." Procedures are categorized based on the setting in which such information is typically encountered. Finally, in regards to the security and confidentiality of electronic information, VDH abides by the Commonwealth's SEC501 Security Policy in addition to our extended Information Technology Security

¹⁶ In addition, there was no on-going investigation for which Grievant should have realized disclosing her disciplinary action might undermine the investigation.

Manual. Specifics regarding the handling of electronic confidential data are contained in those documents.

It is the policy of VDH to protect confidential information. Confidential information includes Protected Health Information (PHI) and Personal Information (PI) regarding employees, clients/patients, and the public as well as other forms of confidential information related to proprietary and/or business information. This policy requires personnel to take all necessary and proper precautions to appropriately protect confidentiality in their day to day use of confidential information. In a public health setting, confidential information is typically encountered while:

- Providing clinical/patient care services
- Conducting public health investigations
- Managing human resource records
- Accessing governmental classified information ***

Limit Disclosure of Confidential Information

VDH personnel shall limit disclosure of confidential information to only authorized persons. VDH personnel shall follow the confidentiality procedures, which delineate when and to whom disclosures can be made. VDH personnel shall limit disclosure of confidential information to the minimum amount of confidential information necessary to accomplish the intended purpose of the disclosure.

Personal Information (PI)

All information that: describes, locates or indexes anything about an individual including his or her real or personal property holdings derived from tax returns, and his or her education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment records, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and the record of his or her presence, registration, or membership in an organization or activity, or admission to an institution. PI includes information such as race, sex, age, home address, home telephone number, marital status, dependents' names, insurance coverage, or Social Security Number.

"Personal information" shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information. There is "personal information" that is routinely used in agency emails that is not subject to this policy and every staff member should use discretion and professional knowledge to make that determination. If you remain uncertain as to whether or not this policy applies to the personal information you are using, seek guidance from your management.

VDH Policy 1.01 provides a detailed definition of confidential and personal information but it does not define pending disciplinary action as confidential information. It does not prohibit an employee from disclosing pending disciplinary action about that employee to others. Grievant did not disclose protected health information. She was not managing human resource records of other employees. Grievant did not violate VDH Policy 1.01.

The Agency alleged Grievant acted “in a manner that causes duress and fear of retaliation (39) violates Civility in the Workplace, VDH and DHRM Policy 2.35.” Grievant sent Ms. C an email indicating her refusal to assist Ms. C with her FMLA request because the reason “I am deferring to [the Supervisor] is because I was presented with a complaint against me at the close of business today that rises, according to the memorandum, to the level of possible termination of my employment with the Virginia Department of Health” and “I was given less than one business day to submit a response to [the Supervisor] with respect to the aforementioned complain” Grievant sent an email to her subordinates including Ms. C “so you are aware that I am not on vacation, deliberately unresponsive or engaged in other tasks that take precedence over the team.”

Sending Ms. C emails was not a retaliatory action. Grievant’s emails do not express an intent to retaliate. Refusing to assist Ms. C was not a retaliatory action. Grievant sent previous emails indicating her unfamiliarity with the process to request FMLA and Grievant explained she would be focusing on responding to possible disciplinary action.

Grievant’s disclosure to Ms. C and the other employees that Grievant was facing possible disciplinary action did not create a reasonable fear of retaliation by Grievant. Grievant’s assertion that she intended to challenge the disciplinary action did not mean she intended to retaliate against Ms. C. Ms. C assumed incorrectly that Grievant intended to take some unspecified retaliatory action against Ms. C. Grievant did not bully or harass Ms. C.

Grievant did not take any adverse employment action against Ms. C or suggest that she intended to do so. Ms. C’s speculation that she might be the subject of retaliation is not sufficient to prove retaliation or a lack of civility.

The Agency alleged, “[t]hese actions coupled with an overall below contributor performance evaluation for 2021 demonstrates unsatisfactory performance (11).” Receiving a below contributor performance rating does not in itself give rise to disciplinary action.

The October 12, 2021 Group II Written Notice with removal must be reversed.

Attorney’s Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the Hearing Officer finds that the employee has

substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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"¹⁷ 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. In light of this standard, the Hearing Officer finds there is no basis to further reduce the disciplinary action in this grievance.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action date September 24, 2021 is **reduced** to a Group I Written Notice. The Agency's issuance to the Grievant of a Group II Written Notice with removal dated October 12, 2021 is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.

¹⁷ Va. Code § 2.2-3005.

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.