COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11966

Hearing Date: July 10, 2023
Decision Issued: July 12, 2023

PROCEDURAL HISTORY

On December 19, 2022, Grievant was issued a Group I Written Notice of disciplinary action. The offense was obscene or abusive language, disruptive behavior and violation of DHRM Policy 2.35, Civility in the Workplace.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 26, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On July 10, 2023, a hearing was held in person, the earliest date available to both parties.

Both the Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

DHRM Policy 1.60, Standards of Conduct, requires employees (among other things) to:

- Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.
- Resolve work-related issues and disputes in a professional manner and through established business processes.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 19.

A Group I offense includes acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention. Use of obscene or disrespectful language falls squarely within a Group I offense, and the agency has the discretion to issue written counseling or issue a Group I Written Notice. The Standards of Conduct, Agency Exh. 19.

The Offense

The Group I Written Notice, issued by the Grievant's direct supervisor on December 19, 2022, detailed the facts of the offense, and concluded:

> [Grievant] violated the DHRM Policy 1.60 and DOC Operating Procedure (OP) 135.1-Standards of Conduct, OP 135.3 Standards of Ethics and Conflict of Interest, DHRM Policy 2.35 Civility in the Workplace, and OP 145.3 EEO, Anti-Harassment and Workplace Civility-Guidance on Prohibited Conduct. On 12/1/22, at 2:00 p.m., I met with [Grievant] to review his 2022 Performance Plan and Evaluation and 2022-2023 Employee Work Profile as well as a counseling memo and Notice of Improvement Needed for issues related to performance. After reviewing the performance plan and EWP, during which I had cited some performance issues that we would be discussing further, I began to review the counseling memo. As I was reviewing the memo, he cut me off and said he just wanted to sign it. I advised him that I didn't want him signing the document without reviewing the contents with him. At that time he threw the paper at me and stated "Fuck this shit! I didn't come back to work for this shit!", before

> exiting my office. At 2:22 p.m. I received an email from [Grievant] stating that he was leaving for the day.

Agency Exh. 1. As circumstances considered, the Written Notice included:

> Under the Standards of Conduct, the aforementioned offenses reflects as unacceptable behavior that are severe in nature and practically considered as a Group II Offense. However, [Grievant] has been a good employee with a history of satisfactory contributor to the unit, and does not have any existing discipline in his record. Under these mitigating circumstances, a Group I Written Notice is warranted for this incident as a progressive discipline. This is required in the interest of maintaining a productive and well-managed work force. Any further unacceptable acts of behavior or performance will be addressed under the Standards of Conduct.

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed the Grievant as a mental health clinician II, and the Grievant has been employed with the Agency for 18 years, without other active disciplinary actions.

The Grievant's direct supervisor, unit director, testified consistently with the offense noted in the Written Notice. She testified that the discipline was mitigated from at least one Group II Written Notice to one Group I Written Notice, as described in the circumstances considered within the Written Notice. She also noted that as of the date of the Written Notice, the Grievant had not yet apologized for his conduct. The Grievant has returned to work from a four-month leave, but the supervisor was not privy to the circumstances. The program director also testified regarding her first resolution step response to the Grievant's grievance, affirming the Group I Written Notice. Agency Exh. 6.

Testifying for the Grievant, the facility's assistant warden testified to her good experience with the Grievant at an earlier post as well has his current one. The assistant warden described the Grievant as a hard-working employee, hospitable and not disrespectful nor disruptive.

Through his testimony, the Grievant admitted to his profane verbal outburst as described in the Written Notice. However, he denies that he threw papers at his supervisor. The Grievant asserts that mitigating circumstances should weigh in favor of dismissal or reduction of the Group I Written Notice. The Grievant was on a four-month bereavement leave following the sudden death of his father, that followed the death of his mother a few months before that. The Grievant testified that the meeting regarding performance issues should not have occurred immediately upon his return to work from a sensitive leave and family situation. Just prior to his return to work, the Grievant was taking prescribed medication that he believes contributed to his disruptive conduct. Grievant's Exhibit.

Analysis

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 (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

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 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. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has 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.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has reasonably proved the misconduct supportive of the Group I Written Notice.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice. Although the Grievant denied throwing the papers at his supervisor, the conduct

is consistent with the verbal abuse and the testifying supervisor credibly testified that the Grievant threw the papers toward her. How papers are tossed, however, is subject to interpretation of intent. Regardless, without this element of the Written Notice, the profanity directed to the supervisor, alone, is sufficiently abusive, disrespectful, and insubordinate to warrant a Group I Written Notice.

The Grievant's evidence and testimony establishes the essential facts of the offense. The offense falls squarely within the scope of a Group I Written Notice. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group I Written Notice. The Agency conceivably could have imposed lesser discipline, but its election for a Group I Written Notice is within its discretion to impose progressive discipline.

Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules,* § VI.B.1.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." 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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that it already mitigated from a Group II to a Group I Written Notice.

Given the nature of the Written Notice, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline. The Agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. This offense was not a situation outside the Grievant's control.

The Grievant made a credible case for mitigation that impressed me. The Grievant had a long tenure with the agency and had a record of satisfactory work performance. Regardless, under the *Rules*, however, an employee's length of service and satisfactory work performance, standing alone, are not sufficient for a hearing officer to mitigate disciplinary action. *Thus, the hearing officer lacks authority to reduce the discipline on these bases.* On the issue of mitigation, the Grievant bears the burden of proof, and he lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

Under the EDR's Hearing Rules, the hearing officer must give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the extent of the disciplinary action. In light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's Group I Written Notice must be and is upheld.

APPEAL RIGHTS

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

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.

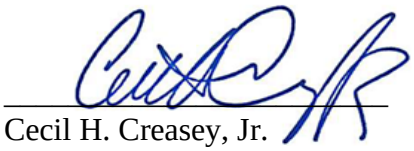
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

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