

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

DIVISION OF HEARINGS

In the matter of: Case No. 11961

Hearing Officer Appointment: April 12, 2023

Hearing Date: August 16, 2023

Decision Issued: August 28, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently a Natural Resource Specialist II at the Virginia Department of Conservation & Recreation (the “DCR” or the “Department” or the “Agency”). The Grievant requested an administrative due process hearing to challenge a Group II Written Notice, issued on March 15, 2023, for violations of Written Notice Offense Codes 37 <Disruptive Behavior> and 78 <Interference with State Operations> by the DCR, with termination due to the accumulation of Written Notices, effective March 15, 2023.

The issues for hearing are those delineated by the Grievant in his Form A.

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.

The Grievant is seeking rescission of the Group II written notice and the termination, amongst other relief.

At the hearing, the hearing officer received various documentary exhibits into evidence, namely exhibits 1-36 in the Agency's exhibit binder.¹

The parties all agreed that email is acceptable as a sole means of written communication.

The hearing officer recorded the hearing.

APPEARANCES

Representative for Agency
Grievant
Legal Counsel
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Natural Resource Specialist II at one of its state parks (the "Park"). AE 7.
2. The Grievant performed a vital function for the DCR as a Class 4 licensed operator of its wastewater treatment plant at the Park. AE 12. On January 10, 2023, the Grievant was given a 10% base pay increase to take on additional responsibilities related to operating the wastewater plant.
3. Pursuant to his employee work profile (EWP), the Grievant is required to maintain the operation of the wastewater plant, which includes taking and

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not offer any exhibits.

reporting prescribed water sample tests and maintaining records of plant operations.

5. The Park Manager described the Grievant's new duties in an e-mail to the Grievant dated January 13, 2023.
6. The grievant was to become the Park's main wastewater treatment plant (WWTP) and well operator. The email added, "This will be in conjunction with the contracted service provided by a future, 3rd party company for the WWTP."
7. The email continued
 - In charge of preventative maintenance for the wells, WWTP and additional septic fields/tanks in the park. Large installations and repairs outside of your scope of work will be contracted out.
 - Weekends will be shared with trained park staff, I will only want you operating the plant 1 out of every 3 weekends. The exception would be difficult scheduling circumstances...i.e. sickness, vacation etc...
 - Removal of vehicle maintenance and upkeep from responsibilities
 - Maintain a flexible schedule. When you work weekends you will have the ability to flex the time off
 - A permanent 10% raise will be applied to your current salary.
8. Grievant was the only employee at the Park who was licensed and knowledgeable about all his duties concerning the WWTP.
9. The Virginia Department of Environmental Quality ("DEQ") has oversight of the WWTP and the Park must prepare daily and other tests and reports for DEQ.
10. As testified by the Agency's Deputy Director of Administration and Finance, the Agency has approximately 500 full-time employees, 1200 wage associates, and an extremely active, demanding, high dollar procurement process.
11. The Park alone, one of many, receives approximately 150,000 annual visitors, spending approximately \$ 6,700,000.00.

12. Accordingly, attendance at, and performance of, Grievant's work was critical for the orderly and efficient functioning of the Park.
13. Despite this critical need, Grievant committed repeated disciplinary infractions by refusing to perform his work duties, following his repeated complaints that during the Period, his 10% base wage increase (still in process) had not yet been reflected in his pay, that the third-party contractor referred to in ¶ 6 above had not yet been procured and that therefore he should receive a 20% base wage increase.
14. On Tuesday February 28, 2023, at 3:30 pm, via email, the Grievant informed the Agency that he was no longer going to complete the duties in his EWP, effective March 1, 2023, unless certain conditions were met. AE 23. One of the Grievant's ultimatums to the Agency was that if he was not given a 20% temporary pay increase back dated to January 10, 2023, Grievant would contact DEQ informing DEQ that "[Grievant] will not be liable for our plant starting 3/1/2023."
15. On Wednesday, March 1, 2023, the Park Manager provided the Grievant with a written counseling memo (AE 26), detailing the Agency's expectation that Grievant complete all job duties in the EWP as well as the new duties agreed to in the January 13, 2023 e-mail.
16. The Grievant was notified that his refusal to complete the duties agreed upon would constitute a failure to uphold his responsibilities and the policies of the Agency.
17. At 3:30 pm on March 1, 2023, Grievant called the Park Manager and informed him that he had raised the floats at the plant and that he was leaving the plant. The

Grievant did not provide any direction regarding how to lower the floats or how the Park Manager should otherwise respond to this information.

18. In short, the Park was left in a tenuous unknowing position of scrambling to determine how to maintain the plant.
19. The Grievant failed to work as agreed, materially and adversely interfering with and disrupting Agency operations. Park staff were of necessity diverted from their core responsibilities to address plant needs. Outside contractors had to be hired on an emergency basis at extra cost to the Agency.
- 20.. On March 15, 2023, Grievant was issued a Group II Written Notice for violations of offence codes 13 <Failure to follow instructions or policy> and 56 <Insubordination>. This Written Notice was not contested by Grievant.
21. On March 15, 2023, the Grievant was issued a second Group II Written Notice at issue here, for violations of Written Notice Offense Codes 37 <Disruptive Behavior> and 78 <Interference with State Operations> by the DCR, with termination due to the accumulation of Written Notices, effective March 15, 2023.
22. 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.
23. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
24. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

25. 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 4. 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 did not follow state and agency policies concerning his critical agreed to work duties.

Specifically, the SOC state, amongst other things, that Group II level offences include acts of misconduct, violations of policy, or performance of a more serious nature that significantly impact the agency’s services and operations. AE 4.

Under the SOC, employees are expected to follow supervisor’s instructions and comply with written policy or agency procedures. Similarly, under the Agency’s Core Behavioral Competencies (AE 6), cooperation with peers and supervisors and proactive resolution and avoidance of unnecessary conflict is stressed.

The Grievant's disciplinary infractions were reasonably classified by management as a Group II offense. Indeed, as argued by the Agency, the Grievant’s infractions because of the aggravating factors could have led to a Group III charge. In any event the infractions are certainly reasonably classified as a Group II offense and a second Group II normally results in discharge. AE 4.

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 various offenses are appropriately classified at the Group II level with the Agency appropriately exercising the discipline and ending the Grievant's employment due to accumulation of two Group II Written Notices.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations rose to the level of a Group II offense.

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 demands of the Grievant's work environment;
2. the Grievant's long tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's past good service to the Agency; and
5. the Grievant's lack of formal discipline prior to March 15, 2023.

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, and the Grievant held an important position where management of necessity relied on him to attend work in strict conformity with Agency policies, as he had undertaken to do. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

Additionally, Grievant supervised about 5 wage employees, not full-time employees. EDR has consistently held supervisors, such as Grievant in this case, to a higher standard. As

EDR stated in case No. 9872, in evaluating misconduct by a supervisor that to a non-supervisory employee would have been a Group I, the discipline was increased to a Group II, stating, "This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision." *See, also*, DHRM Ruling 2015-3953:

The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue. As discussed above, the Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy. DHRM has previously determined that "agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees." The Rules for Conducting Grievance Hearings require that a hearing officer must show deference to how the agency weighs the supervisory status of an employee in determining the appropriate level of discipline. Here, the agency appears to have determined that the grievant's misconduct was more severe based, in part, on his position as a supervisor. Because policy permits an agency to hold supervisory employees to a higher standard than non-supervisory employees, the hearing officer did not err in deferring to the agency's weighing of that factor. We decline to disturb the decision on this basis. [Footnotes omitted].

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 8/28/ 2023

John Robinson

John V. Robinson, Hearing Officer

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

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).