

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11983

Hearing Officer Appointment: June 6, 2023

Hearing Date: July 26, 2023

Decision Issued: August 10, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently an Assistant Estimating Manager in a facility (the “Facility”) at the University of Virginia (“UVA” or the “University” or the “Agency”). The Grievant requested an administrative due process hearing to challenge the termination of his employment pursuant to a Group III Written Notice, issued on April 20, 2023, with termination also effective April 20, 2023, by management of the UVA, as described in the Grievance Form A dated May 19, 2023. The issues for hearing are those delineated by the Grievant in his Form A.

On June 20, 2023, at noon, the parties held a first prehearing conference call via GOOGLE MEET. The Grievant, the Agency advocate and the hearing officer participated in the call. The parties all agreed that email is acceptable as a sole means of written communication. Following the call, the hearing officer entered his Scheduling Order of June 24, 2023, incorporated herein by this reference.

The hearing officer’s appointment is effective June 6, 2023.

The Grievant is seeking the relief requested in his Grievance Form A, including rescission of the Written Notice.

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 remote Zoom hearing, the Grievant represented himself and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely the exhibits in the Agency's white exhibit binder and pages 1-24 from the Grievant.¹

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as an Assistant Estimating Manager. The Grievant has been with the Agency for approximately 15 years.
2. The Grievant held an important position which is responsible for important functions concerning new construction of large (such as a building) and small (such as a water fountain) items within the University.
3. This position follows an established routine.
4. As was its prerogative, on March 13, 2023, the University informed the Grievant that effective the same day, the Grievant was being placed on administrative leave

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant's exhibits are designated GE followed by the page number.

with pay (no charge to Grievant's leave balance) for a fitness-for-duty evaluation (FFDE).

5. The Associate Director for Construction and Renovation Services ("Associate Director") informed the Grievant that the evaluation was being required per University policy HRM-037: Evaluating Employee Fitness for Duty, because of observable behaviors that Grievant had exhibited in the workplace over a period of 2 years, that caused management and peers concern for Grievant's well-being.
6. These observable behaviors included frequent and consistent tension with managers translating to adverse group work environment, overall tired appearance including red eyes, anxious and fidgety body language, forgetfulness regarding managers' requests and equipment needed to perform work (computer, phone, etc.).
7. The Grievant was supplied a copy of the FFDE policy and was repeatedly informed that the policy was not punitive but intended to support the Grievant as a valued University employee. However, the Grievant was also repeatedly informed by management that his cooperation in the process was expected and that noncompliance with the fitness for duty requirements could lead to disciplinary action, up to and including, termination of employment.
8. The Grievant was supplied the contact information for a member of the Faculty Employee Assistance Program (FEAP), who was to act as the Grievant's case manager or counselor and provide support to the Grievant during the FFD process.
9. The counselor did a stellar job, but ultimately his significant rehabilitative efforts were sabotaged by the recalcitrance and intransigence of the Grievant.
- !0. The FEAP counselor determined that the Grievant should not return to work, but should undergo further assessment, at no cost to him. Management agreed to pay for the more comprehensive \$3,500 assessment (normally \$750) with The Institute of Law, Psychiatry and Public Policy, an entity independent of the University.
11. For example, the FEAP Counselor sent consent forms to the Grievant for his signature so that an FFD Evaluation could be scheduled. The Grievant returned the forms unsigned. The Grievant continued to be uncooperative in the process until finally, on 3/21/2023 the FEAP Counselor informed the Grievant that an evaluation appointment was scheduled for 3/29/2023 at 10:00 a.m. The FEAP Counselor also reminded the Grievant that he needed to return the signed consent forms, so that the FEAP Counselor could provide the evaluator with the Grievant's pertinent information.

12. On 3/27/2023, the Grievant signed and returned the form; however, he entered an expiration date of 3/31/2023, just 2 days beyond his appointment. This was contrary to the FEAP Counselor's directions, which were for the Grievant to provide a 30-day expiration date. Two days would not reasonably allow for the Fitness for Duty process which includes completion of the evaluation and a formal recommendation.
13. On 3/28/2023 the Grievant received communication via email and text message to re-sign and re-date the consent forms he would be receiving from the FEAP Counselor.
14. On 3/29/2023, the Grievant responded by email that he had received new consent forms but had not signed them yet. At this time, Grievant asked why the appointment was scheduled with a counselor who is employed by the University of Virginia. Grievant also stated that he would be "unable to make the appointment for sudden unforeseen reasons." Grievant apologized and stated that he would look for the appointment to be rescheduled. The "sudden unforeseen reasons" were later reasonably determined by management to be unsubstantiated.
15. The University has a state code of 207, whereas the University Medical Center (under whose auspices the Institute falls) has a state code of 209. Accordingly, the Medical Center is "independent of" the University and in any event, the hearing officer finds that the Grievant was merely using this argument raised at a late stage in the process and again at the hearing, as a pretext to sabotage the process.
16. Because of Grievant's refusal to comply with the Fitness for Duty requirements, Management reasonably concluded that Grievant is unable or unwilling to perform his duties safely and effectively and that termination was appropriate.
17. The operational needs of this facility depend on the availability of staff showing up to follow the established routine.
18. This behavior also affects the morale of other employees.
19. The Grievant's unsatisfactory performance has negatively affected the University's ability to perform its routine construction operations.
20. Appropriately exercising progressive discipline on April 20, 2023, Management issued to the Grievant a Group III Written Notice (AE 2) for failure to follow instructions and/or policy. AE 2 & 3.
21. The Grievant's disciplinary infractions negatively and materially impacted the Agency's operations.

22. The University 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 Agency's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
24. The Agency'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 9. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Grievant's disciplinary infractions were reasonably classified by management as a Group III offense. The Grievant argues that the Agency has misapplied policy and acted unjustly. 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 progressive discipline. While the Grievant argues that the Agency's performance expectations were unclear, the hearing officer finds, to the contrary, that Management's expectations were clearly communicated to the Grievant on multiple occasions.

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.

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 University does not consider mitigating factors, the hearing officer should not show any deference to the University in his mitigation analysis. In this proceeding the University 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 his analysis:

1. the Grievant's many years of service to the Agency;
2. the demands of the Grievant's work environment;
3. the Grievant's past overall good job performance ;
4. deaths in the Grievant's family;
5. the COVID-19 pandemic; and
6. illness in the Grievant's family and Grievant's related provision of care.

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 and appearance and reputation of the Agency and the Agency issued to the Grievant significant prior notice and progressive verbal counseling concerning infractions in the recent past. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government

and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a “super-personnel officer” and must be careful not to succumb to the temptation to substitute his judgment for that of an agency’s management concerning personnel matters absent some statutory, policy or other infraction by management.

Id.

In this proceeding, the Agency’s actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department’s discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency’s action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

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

Please address your request to:

Office of Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer.

The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

ENTER: 8/ 10/ 2023

John Robinson

John V. Robinson, Hearing Officer

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

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