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. 11987

Hearing Date: August 1, 2023
Decision Issued: August 10, 2023

PROCEDURAL HISTORY

On May 18, 2023, Grievant was issued a Group II Written Notice of disciplinary action, with termination based on accumulation of discipline. The offense was failure to follow policy, unauthorized use of state property, and computer/internet misuse during September 27 through December 7, 2022. The prior, active discipline is a Group III Written Notice resulting in demotion and pay reduction. Agency Exh. N.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 26, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On August 1, 2023, a hearing was held in person at the Agency's on-site facility. Although the Grievant initially had a lay advocate, he proceeded at hearing without one.

The Grievant and Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits or Grievant's Exhibits, respectively.[1] The Grievant submitted an opening brief that is made a part the grievance hearing record. Following the hearing, both sides were permitted to file post-hearing briefs by August 7, 2023, and each side submitted timely closing briefs that are made a part of the grievance hearing record. The record closed August 7, 2023.

In its closing brief, the Agency seeks a ruling on its pre-hearing objections to the Grievant's exhibits. Because the Grievant was clearly asserting a retaliation and other mitigating factors defense to the Written Notice, I overrule the Agency's objections to the Grievant's exhibits. Such exhibits, of course, are subject to the Grievant's supporting evidence and testimony pertaining to any exhibit's purpose, relevance or materiality to the hearing officer's findings. If not mentioned as a basis for my decision, little or no weight is attributed to any such

[1] Grievant's Exhibit 17 is a YouTube video. Prior to the grievance hearing, the hearing officer advised the Grievant that the hearing officer may not create an exhibit for the parties, thus advising the Grievant to submit the video via digital media. The Grievant did not submit the video exhibit via digital media.

exhibit. As for the Agency's objections to the Grievant's bases for grievance and requests for relief, there is no indication to the hearing officer that the grievance was considered anything other than qualified in full. *See Grievance Procedure Manual* § 4.2. Of course, the hearing officer is limited to the relief he is authorized to provide. *See Grievance Procedure Manual* § 5.9.

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."

The Agency's Operating Procedure 135.1, *Standards of Conduct*, provides that a Group II offense includes acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant termination. Agency Exh. D, p. 15. Group II offenses include, among other things:

> Failure to follow a supervisor's instructions, perform assigned, work, or otherwise comply with applicable established written policy or procedure.
>
> Unauthorized use or misuse of state property or records.

Agency Exh. D, p. 15-16.

Agency Operating Procedure 310.2, *Information Technology Security*, provides, at § III.B.4:

> Personal use of the computer and the Internet – Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's electronic communications tools, including the Internet is permitted during work hours, but not to interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities.

Agency Exh. G.

The Fraud and Abuse Whistle Blower Protection Act (WBPA), provides the following policy:

> It shall be the policy of the Commonwealth that citizens of the Commonwealth and employees of governmental agencies be free able to report instances of wrongdoing or abuse committed by governmental agencies or independent contractors of governmental agencies.

Va. Code § 2.2-3009.

Va. Code § 2.2-3010. Definitions.:

> "Whistle blower" means an employee who witnesses or has evidence of wrongdoing or abuse and who makes or demonstrates by clear and convincing evidence that he is about to make a good faith report of, or testifies or is about to testify to, the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority.

The Offense

The Group II Written Notice, issued by the Agency's warden on May 18, 2023, detailed the facts of the offense, and concluded:

> As a Corrections Lieutenant, you are expected to model the expectations and contribute to the agency's public safety mission by managing daily activities of security supervisors, Corrections Officers and inmates housed within the facility. Based on voluminous amount of information found during the investigation related to your gratuitous use of the internet, DOC IT officials determined your internet usage violated Operating Procedure 310.2.
>
> Consequently, a Group II Written Notice is warranted for unauthorized use of state (DOC) property, computer/internet misuse, and failure to follow written policy. Furthermore, based on your active Group III Written Notice, termination is warranted due to the accumulation of discipline.

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

> During the due process meeting, you deflected the purpose of the meeting and insisted if the DOC did not "negotiate" this matter, you would share confidential employee information, unrelated to this matter, but purportedly known to you, outside of a need-to-know basis. Your comments were concerning because the employees' names you mentioned had nothing to do with nor were involved in this matter and instead seemed intended as a threat.

Agency Exh. L.

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's Chief Information Officer (CIO), who oversees the Information Security Office, testified that the Grievant's internet usage data had to be requested from a separate agency, the Virginia Information Technologies Agency (VITA). See also Agency Exh. F; Agency Exh. G. The CIO testified that VITA originally pulled the raw data of the Grievant's internet usage by pulling internet logs from a proxy server, which pulls "everything" that comes into a user's browser when accessing a webpage. Thus, the CIO explained, accessing one webpage could pull multiple URLs, which, to the untrained eye, could be perceived as the user accessing all of those URLs rather than just a single webpage. The CIO's team processes that raw data by removing URLs from the logs that the CIO's team can determine were unlikely to have been accessed. The CIO explained that one method used by his team is by distinguishing regular URLs (*i.e.*, www.google.com) from URLs with "api" in the URL string. The CIO testified that this process gives the employee the "benefit of the doubt." After the CIO's team processed that data, they provided it to the Agency's human resources department. The CIO further testified that a subsequent request was made of VITA that pulled the Grievant's internet usage data using a different tool called Hindsight. Using Hindsight, VITA was able to provide the Grievant's search engine queries. The CIO testified that his team was asked by human resources whether the Grievant's personal internet usage appeared excessive, and his team stated that it was. On cross-examination, the CIO testified that the amount of non-business traffic was "enormous."

The Agency's human resources assistant (HRA) testified that she received a batch of the Grievant's internet usage data in an Excel spreadsheet around February 2023 and was asked to review the log and provide a summary of websites associated with personal use. She reviewed the data and created a summary of access to sites unrelated to agency business. Agency Exh. O. She testified that if the same website appeared more than once in the same hour, she listed the website only once in her summary log. Once she completed that summary report, she provided it to her superiors within human resources. The HRA testified that she received the second search engine queries in multiple Excel files around late March or early April 2023 and used those files to create one master Excel file with all of the search queries. Agency Exh. P. Once she completed that task, she provided the master Excel file to her superiors within human resources.

After the warden issued the amended due process notice, he consulted with human resources personnel, and they advised him that they had researched past discipline for conduct similar to the Grievant's and confirmed that employees disciplined for similar instances of

excessive personal use of internet during work hours had received Group II offenses. Based on that precedent, it was determined that the Grievant's misconduct warranted a Group II Written Notice, not a Group III as advised in the amended due process notice. The warden issued the Group II Written Notice, Agency Exh. L, and because of the Grievant's active Group III Written Notice for his prior offense, the warden terminated the Grievant's employment for accumulated discipline.

The Grievant testified consistently with arguments in his opening brief, the contents of which are incorporated herein by this reference.[2] In testimony, the Grievant did not specifically refute the Agency's evidence regarding excessive internet usage, but he argued that the investigation into his internet usage stemmed from an unfounded, improper disciplinary charge and investigation into his email of December 21, 2022, Agency Exh. J, described by the Grievant as a protected whistle blower communication or his protected opinion on a matter of public concern. The Grievant asserts the Agency retaliated against him for this protected communication. Thus, according to the Grievant, his discipline is a pretext. The Grievant advanced other factual defenses in his opening brief, such as misconduct by the Attorney General and a General Assembly delegate, but he failed to provide evidence of such during the grievance hearing.[3] [4]

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

[2] The Grievant's opening brief includes allegations and issues that the Grievant has reserved for judicial review. In his opening brief, the Grievant also challenged the impartiality of the hearing officer, but the Grievant did not make a motion for the hearing officer to recuse or otherwise address the allegation during the grievance hearing. The hearing officer also "has a concomitant obligation not to recuse himself or herself absent a valid reason for recusal." *See, e.g.*, EDR Ruling No. 2004-934. *Rules for Conducting Grievance Hearings*, § III.G. The hearing officer finds no reason to address this issue further. The opening brief is not considered evidence.

[3] The reason for the evidentiary omission may be inferred from Grievant's opening brief conclusion that the grievance hearing will be a "kangaroo court hearing" and he reserved his legal issues for the circuit court.

[4] The Grievant made a pre-hearing motion on July 27, 2023, for an order for documents from the Agency that was denied as untimely. The hearing officer's scheduling order specified that any request to the hearing officer for orders for documents or witnesses had to be made no later than July 5, 2023, so that any such order could have effect before the August 1, 2023, grievance hearing. The Grievant made a request for documents directly to the Agency's counsel on July 20, 2023, to which the Agency largely objected on July 25, 2023. Because there was no time left for an order to produce documents, the hearing officer denied as untimely the Grievant's motion to order production. The hearing officer also denied the Grievant's motion to halt the grievance process, as any contested motion for continuance must present just cause (meaning some basis outside the party's control) (*see Rules for Conducting Grievance Hearings* at § III.B.).

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 of the Group II Written Notice.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice. The Grievant's testimony essentially corroborates the essential facts of the offense, as he presented no refuting evidence or cross-examination to overcome the Agency's evidence of excessive internet usage. The Grievant's defense assertion is that the Agency retaliated against him for his whistle blower email of December 21, 2022, concerning the Agency's alleged corruption. The Grievant was the only witness testifying for the Grievant. Cross-examination of the Agency's witnesses elicited no persuasive evidence of retaliation. The Grievant's mere assertion of protection of the WBPA is unpersuasive.

I find persuasive the Agency's argument that the Grievant did not qualify as a whistle blower, since his email of December 21, 2022, contained only information already published. *See* definition of "whistle blower," above. Va. Code § 2.2-3010. However, assuming the

Grievant to be a whistle blower or expressing his opinion on matters of public concern, he engaged in a protected activity. An Agency may not retaliate against its employees.

EDR has long analyzed retaliation claims under a burden-shifting framework that requires a grievant to demonstrate by a preponderance of the evidence that an agency's actions were a pretext for retaliation.[5] As retaliation is an affirmative defense, the grievant carries the ultimate burden to establish the claim of retaliation.[6] To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.41

Here, I find that the discipline at issue resulted from an investigation into the Grievant's potential misuse of state property – not from a motive to retaliate against the Grievant for that correspondence. The grievant maintains that his employment would not have been terminated had his December 21 correspondence, using his state email account, not attracted attention to him for alleging Agency corruption. Since the information conveyed had previously been published I do not infer pretext from this chain of events. The Grievant, other than his own assertions, presented no other evidence of pretext. Engaging in a protected activity does not insulate an employee from discipline for misconduct. Ultimately, weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and here the facts are not in dispute and the record contains evidence that supports the Agency's discipline. The Grievant did not present sufficient evidence of retaliation or disparate treatment for the internet misconduct. In sum, and in light of the Grievant's burden to prove his affirmative defenses, I conclude that the Grievant has not proved he is protected by the WBPA or other statute and, alternatively, to retaliation in general.

The offense falls squarely within the scope of a Group II Written Notice as a serious violation of policy and trust. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group II Written Notice. The Agency conceivably could have imposed lesser discipline, but its election for a Group II Written Notice, with termination for accumulation of discipline, is within its discretion to impose progressive discipline.

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[5] *See Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017); *see generally Rules for Conducting Grievance Hearings* § VI(B)(1). Federal courts have found it appropriate to apply the same burdenshifting framework to retaliation asserted specifically under Virginia's WBPA. *Carmack v. Virginia*, Case No. 1:18cv31, 2019 U.S. Dist. LEXIS 148046, at *52-54 (W.D. Va. Aug. 29, 2019), *aff'd*, 837 Fed. App'x 178, 183 (4th Cir. 2020) ("Given the amenability of the [WBPA] to the application of the *McDonnell Douglas* framework, the regularity with which courts apply this framework in assessing the causation element in cases involving state whistleblower statutes and/or provisions, and finding no reason to depart from this approach, the court will apply this framework in the present matter.").

[6] *Rules for Conducting Grievance Hearings* § VI(B)(1).

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 the violation was appropriately a Group II.

Given the nature of the Written Notice, as decided above, 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 a Group II Written Notice must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

Termination is the normal disciplinary action for an accumulation of a Group III and any other level of Written Notice. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. There is no evidence of another situation or similar offense treated differently. This was not a situation outside the Grievant's control. Here, given the inherent level of trust incumbent with the Grievant's position as a lieutenant, the nature of the offense has implications of aggravating circumstances.

The Grievant had a long tenure with the agency and had a record marked with a serious active Group III Written Notice. Regardless, under the *Rules*, however, an employee's length of service and otherwise 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 II Written Notice, with job termination, 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.

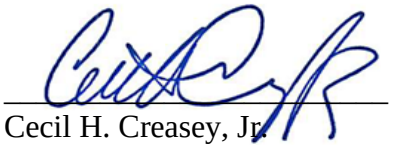
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[7]

[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

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