

**COMMONWEALTH OF VIRGINIA  
Department of Human Resource Management**

**Office of Employment Dispute Resolution**

**DECISION OF HEARING OFFICER**

**In re:  
Case Number: 11963**

Hearing Date: August 25, 2023  
Decision Issued: September 1, 2023

**PROCEDURAL HISTORY**

The Hearing Officer was appointed effective May 9, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on May 24, 2023 and the Grievance Hearing was scheduled for August 25, 2023, with a copy of all exhibits and list of witnesses to be provided no later than August 18, 2023.

The Grievance Hearing was conducted on August 25, 2023 as scheduled.

The grievance hearing addressed the following two Written Notices:

- Group III Written Notice issued on March 9, 2023 for public humiliation of a subordinate in violation of the Standards of Conduct and the Civility in the Workplace Policy with termination of employment. (Agency Exhibit 2)
- Group III Written Notice also issued March 9, 2023 for contacting four subordinates to ask what they had reported to management in violation of the Standards of Conduct and the Civility in the Workplace Policy with termination of employment. (Agency Exhibit 3)

**APPEARANCES**

Grievant  
Grievant's Attorney

Agency Party Designee  
Agency's Attorney

EDR Observer

## **ISSUES**

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive for each of the two written notices?
2. As to each Written Notice, did the Grievant's conduct constitute a Group III violation under the standards of conduct?
3. Whether the Agency considered mitigating and aggravating factors as to each written notice?
4. Whether each Written Notice was consistent with law and policy?

## **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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

## **EXHIBITS**

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-21, with the Exhibit behind Tab 9 being withdrawn as an Exhibit by the Agency.

The Grievant Exhibits admitted into evidence are contained in one notebook with tabs 1-5, with an additional grievance exhibit 6 added during the hearing.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness called to testify, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a Workforce Efficiency Group Testing & Training Program Manager (WEG) with such employment governed by the following:

- DHRM Policy 1.60 Standards of Conduct
- DHRM Policy 2.35 Civility in the Workplace
- TRAIT Core Values

The Agency's first witness was at the time the events occurred the acting director of the



Workforce Efficiency Group (WEG) and the Grievant's immediate superior (WED Organizational Chart, Agency Exhibit 4). The witness testified that the Grievant was the manager of the Special Projects Testing & Training, managing six employees as team members. The witness testified that the witness had a good relationship with the Grievant prior to becoming the Grievant's manager.

The witness testified that in the fall of 2022, the witness's boss, the Assistant Commissioner, asked the witness if the witness was aware of any problems with the work environment of the Grievant's team. The witness advised the Assistant Commissioner that the witness was unaware of any problem. However, approximately a week later the witness observed the Grievant being "dismissive of a team member" in the presence of the other team members, upsetting the employee. As a result, the witness then met individually with four of the Grievant's team members. The witness then reviewed their comments and complaints regarding the grievant as set out at Agency Exhibits 12, 13, 14 and 15, each of the interviews taking place in November, 2022. The witness testified that the witness put the most weight on the information gained from the employee as set out at Agency Exhibit 15 because that employee had a good relationship with the Grievant.

The witness testified that after consulting with the Assistant Commissioner the witness met with the Grievant on December 1, 2022 to point out to the Grievant that there is an issue with how the Grievant's staff feels treated at times. The witness testified that the witness followed the talking points set out at Agency Exhibit 11 while meeting with the Grievant and that it was an emotional meeting. However, the witness testified that the Grievant stated that the Grievant did not realize the Grievant was impacting the entire team. The witness testified that as a result of the meeting, the witness was hopeful that given the Grievant's emotional response that the Grievant would recognize that the Grievant's behavior needed to change. However, in January the witness learned that two of Grievant's employees were leaving, taking lateral transfers, so as not to work with the Grievant. As a result, the witness conducted a second round of interviews with the employees in January with the substance of those interviews set out at Agency Exhibits 16, 17, 18 and 19. What the witness learned from the employees was that following the witnesses meeting with the Grievant in December, the Grievant began contacting the employees to find out if each employee met with the Grievant's boss and what did each employee tell the Grievant's boss. The witness testified that the witness was shocked at the Grievant's behavior.

The witness concluded the witness's direct testimony by testifying that the witness believed that the Grievant's actions in contacting the employees was a Group III offense in violation of the Civility of the Workplace and the Standards of Conduct and justified termination in that managers are held to a higher degree. During cross-examination the witness testified that during the December, 2022 meeting with the Grievant the witness never mentioned violation of any specific policy and that the witness did not tell the Grievant that she could not contact the employees to inquire about the employee's meeting with the witness. The witness also stated that



two of the Grievant's team members were not interviewed, one because the person was late joining the team and the second, a part-time employee, "didn't want to say anything."

The Agency's second witness, who began with DMV in 2017, reported to the Grievant since 2021 and was the most senior member of Grievant's team. The witness testified that the Grievant's micro-manager, controlling approach had a paralyzing effect on the team. The witness testified that the Grievant called the witness around 6:00 or 6:30 in the evening the same day that Grievant's supervisor met with the Grievant (December 1, 2022) and was upset that the Grievant's boss has reprimanded the Grievant. The witness testified that the Grievant called again but the witness did not answer and that the next day at work the Grievant shut the door and said "Didn't [Grievant's boss] meet with you?" and wanted to know the specifics. The witness testified that the witness told the Grievant some details of the meeting but not all for fear of "revenge". The witness also testified that the notes of the witness's meeting with Grievant's boss on November 21, 2022 are accurate. The witness testified that later on December 2, 2022 the Grievant called the witness and said that the Grievant had figured out which team member had complained to the Grievant's boss. The witness further testified that after that the witness noticed that the Grievant was no longer targeting the employee who was normally the target of abuse but began targeting the employee the Grievant believed complained to the Grievant's boss. The witness concluded by stating that the witness would quit if the Grievant was still the witness's manager. During cross-examination the witness stated that the witness felt intimidated by the Grievant when the Grievant asked about who complained to the Grievant's boss.

The Agency's third witness began employment with DMV in December 2020 and was one of the employees managed by the Grievant as set out at the WEG Organizational Chart. The witness testified that the witness took a lateral move in January 2023 because the Grievant had created a toxic work environment. The witness said that the Grievant would talk about the witness to the witness's co-workers; that the Grievant was hostile, aggressive and demeaning with the witness and other employees and that one employee got special treatment from the Grievant (the employee who did not wish to speak to the Grievant's boss).

The witness testified that the Grievant called the witness on December 2, 2022 and asked if the witness had talked to the Grievant's boss, to which the witness responded that the witness was not comfortable talking to the Grievant. The witness testified that the witness felt violated by the Grievant's behavior. The witness further testified that the Grievant contacted the witness a second time but that the witness again declined and that the Grievant then hugged the witness before the witness walked away. The witness concluded by confirming the accuracy of the notes set out at Agency Exhibit 18 regarding the witness's meeting with the Grievant's boss on January 18, 2023.

The Agency's fourth witness, a Senior Analyst working under the Grievant, testified that the Grievant's behavior made the witness feel bullied, threatened and intimidated and caused the witness to lose confidence. The witness testified that as a result of the Grievant's abuse, the



witness began looking for other employment in October 2022, resulting in the witness gaining a promotion and transfer away from the Grievant's supervision. The witness confirmed the accuracy of the notes set out at Agency Exhibit 12 regarding the witness's meeting with the Grievant's superior on November 10, 2022, specifically pointing out that on one occasion after the Grievant and Grievant's boss had talked about an awkward interaction involving the witness, the next day the Grievant blamed the witness for "ruining her reputation."

NOTE: At this point of the witness's testimony, the Hearing Officer observed both the witness and the Grievant crying and a brief recess was called.

Upon resuming the witness's testimony, the witness testified that on December 2, 2022 the Grievant contacted each of the person's working under the Grievant to ask about meeting with the Grievant's boss. The witness testified that the Grievant pulled the witness out of a conference in order to ask the witness about meeting with the Grievant's boss. In response to a question during cross-examination, the witness stated that the witness never went to Human Resources to complain about the Grievant.

The Agency's fifth witness, also an employee under the Grievant, testified that when employees started coming back from telework in August 2022 is when the witness first noticed Grievant targeting the employee who was the Agency's fourth witness but did not report this to anyone at that time. The witness testified that the Grievant then shifted to another employee (Agency's third witness) and escalated the abusive behavior to the point where the employee was so upset that the employee threatened to "off myself." The witness testified that the Grievant was playing the employees against each other and the Grievant would pull the witness aside and ask about or talk about employee's co-workers. The witness testified that the Grievant said that if the Grievant could get rid of anyone it would be the employee who testified as Agency witness four, that the Grievant didn't need the Agency and that the Grievant has a lawyer on standby.

The witness then confirmed the accuracy of the notes set out at Agency Exhibit 13 regarding the witness's meeting with the Grievant's boss. The witness testified that on December 2, 2022 the Grievant called the witness into the Grievant's office and asked about details of the witness's meeting with the Grievant's boss. The witness testified that the witness was not honest with the Grievant about what she told the Grievant's boss.

The witness next testified regarding the Adobe meeting to which the Grievant verbally invited the witness to attend. The witness testified that the Grievant was late to arrive at the meeting but upon arriving humiliated the witness in front of those present in the conference room at that time and those participating remotely causing the witness to leave the meeting being very angry. The witness demonstrated the Grievant's behavior that the witness said was humiliating. The witness then testified that the Grievant's version of what occurred at that meeting as set out in Grievant's Exhibit 3, page G9 and at Agency Exhibit 1, page 8 are not true. The witness further testified that although the witness was ready to quit the witness did not report to the

Grievant's boss because the witness had already decided to leave, never having been treated the way the Grievant treated the witness in the witness's eighteen years with the Agency.

The witness further testified that on December 1, 2022 the Grievant called the witness after work but the witness did not answer the call. The witness testified that either the next day or the following day the Grievant told the witness that the Grievant had figured out who complained to the Grievant's boss.

In conclusion the witness confirmed the accuracy of the notes set out at Agency Exhibit 17 regarding the witness's meeting with Grievant's boss.

The Agency's sixth witness was a Program Manager (not under Grievant's supervision) who attended the Adobe meeting described by Agency witness five and confirmed that witness's account and testified that the Grievant interrupted the employee in a rude manner with an abrasive tone. The witness testified that following the meeting the witness talked to the Assistant Commissioner regarding the Grievant's behavior. The witness testified that the witness told the Assistant Commissioner that the Grievant has been abrasive in all of the witness's contacts with the Grievant and the witness knew that any dealing the witness would have with the Grievant would be unpleasant. Upon being cross-examined the witness testified that the witness never went to Human Resources regarding Grievant's behavior.

The Agency's seventh witness was the ER Manager who was contacted by Grievant's superior regarding the concerns with Grievant's behavior. The witness testified that the witness advised Grievant's boss to interview the employee to determine if problems exist. Upon Grievant's boss reporting back to the ER Manager that there were complaints of the Grievant's behavior being erratic and damaging to the work environment, the witness concluded that Grievant's boss should have a meeting with the Grievant to counsel the Grievant. However, the witness testified that upon learning the after the meeting, the Grievant had contacted the employees to interrogate them, the witness's opinion was that Grievant behavior was a clear violation of Civility in the Work Place and the TRAIT Core Values (Agency Exhibit 6 and 7). The witness testified that the Grievant was responsible for knowing and abiding by these policies and indicated that the Grievant had received training as to the contents of DHRM Policy 2.35 Civility in the Work Place (Agency Exhibit 10).

The witness testified that the witness believed that the Grievant's behavior regarding interrupting the employee at the Adobe meeting in a demeaning manner and the attempted interrogation of the employees each justified a Group III notice with termination due to the Grievant's position as a manager. The witness testified that although mitigation was considered, the Grievant being a long term employee with a clean record, mitigation was out weighed by the aggravating circumstance of the chilling effect retaliation by a manager has on the functioning of the Agency.



The witness added that while the information in the first paragraph of each of the two Written Notices are not the grounds for the written notices, the information is necessary to put the specific offenses regarding the behavior at the Adobe meeting and the interrogation of employees into context. The witness also emphasized that the Agency has a zero tolerance for bullying, harassment, discrimination, disrespect and threatening behavior. (Agency Exhibit 8) The witness also testified that the matter was reviewed with the office of the Attorney General and the Agency head prior to issuing the two written notices.

The Agency's eighth and final witness had been with the Agency for nine years and as of 2021 was the Assistant Commissioner. The witness testified that prior to the current events, the witness for a period of time had been the Grievant's superior, that they had a stormy relationship and that the Grievant transferred out. The witness testified that the witness first heard through a friend that there might be a problem with the environment at WEG, causing the witness to inquire of Grievant's supervisor who responded that "I am not aware of anything." However, Grievant's supervisor came back to the Assistant Commissioner based on observations Grievant's supervisor had made on October 25, 2022 which set in motion the November interviews by Grievant's supervisor with Grievant's subordinates. The witness then went on to confirm the evidence already presented by other Agency witnesses.

During cross-examination of Assistant Commissioner, Grievant's counsel introduced Grievance Exhibit 6, a Written Notice issued by the Agency on May 10, 2023 charging a manager with a Group II offense of violation of Policy 2.35, Civility in the Workplace and imposing a five day suspension (a Group II offense carrying a maximum suspension of ten days) the facts of that case involved a manager making a comment to a subordinate in the presence of co-workers which made the subordinate feel intimidated, demeaned and insulted. The offending manager had been counseled regarding this type of conduct previously. The Assistant Commissioner testified that the manager's behavior in that case was not as serious as the Grievant's conduct, justifying the Group III for the Grievant. The witness also admitted under cross-examination that when the Grievant worked under the witness previously for a couple of years, the Grievant had filed a complaint against the witness before the Grievant transferred from under the witness supervision.

The Agency rested its case.

The Grievant's only witness was an employee who was in attendance at the Adobe meeting, which the witness said occurred on January 5, 2023 rather than on December 13, 2022. The witness characterized the meeting very differently than the Agency's witnesses. The witness testified that there were approximately ten people attending the meeting, in person and remotely. The witness said that the witness arrived early but that the Grievant was late to the meeting. The witness testified that the Grievant upon arriving essentially rescued Agency witness five who was stuttering and unable to respond to a question and then wrapped up the meeting. The witness contradicted the Agency witnesses who described the Grievant's behavior as being rude and

demeaning.

The taking of evidence concluded with the Grievant's testimony. The Grievant began by testifying that between 2016-2018 the Grievant worked under the Assistant Commissioner but requested a transfer in 2018 due to the hostile work environment created by the Assistant Commissioner.

The Grievant gave the Grievant's account of what occurred at the Adobe meeting stating that the employee was stuttering and looked up toward the Grievant for help, resulting in the Grievant asking what you are talking about so that the Grievant could help the employee. The Grievant pointed out that in the prior twelve years of employment never had anyone complained regarding the Grievant's treatment of a subordinate. The Grievant testified that because the Grievant's superior at the meeting held on December 1, 2022 did not give the Grievant any details of complaints, the Grievant felt the Grievant needed to contact the employees to get details so the Grievant would know how to correct any problem. The Grievant testified that the Grievant did not think that the Grievant was being disciplined or considered for discipline at that time.

The Grievant in response to the claim that the employees felt intimidated when the Grievant contacted them regarding the December 1, 2022 meeting, referred to Grievant's Exhibit 4, emails between the team members ranging from August 18, 2022 to January 19, 2023. The emails were introduced to demonstrate the healthy work environment. The Grievant pointed out that in the Grievant's most recent Employee Work Profile from 2020 the Grievant received "exceeds expectations." The Grievant pointed out that all prior EWP's were also "exceeds expectations" with the exception of the one "contributor" given by the Assistant Commissioner. The Grievant concluded the Grievant's testimony by stating that regarding the Adobe meeting, all of the Agency witnesses who described the Grievant's behavior at the Adobe meeting lied. The Grievant also admitted that the Grievant did contact all four employees regarding the December 1, 2022 meeting.

In closing, the Agency attorney reviewed the evidence as to each of the two Written Notices and asked that each be upheld as a Group III with termination of employment due to the higher standard that the Grievant was held as a manager. In closing, the Grievant's attorney argued that the Hearing Officer should not uphold either Written Notice and that the Grievant should be fully restored. The Grievant's attorney also argued that Grievant's Exhibit 6 demonstrated that the Agency disciplined the Grievant more severely than another Agency employee for a similar violation, the manager in that instance receiving a Group II offense with a five day suspension.

## CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their



severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.” 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.” (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer’s to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “accordance with rules established by the Department of Human Resource Management...”. Under the rules for Conducting Grievance Hearings “[a] hearing officer must give deference to the agency’s consideration in the 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Hearing Officer concludes that as to the Group III Written Notice regarding the Grievant’s conduct at the Adobe meeting (Agency Exhibit 2), the Agency proved by a preponderance of the evidence the misconduct set out in the Written Notice and that such misconduct constituted a violation of the Standards of Conduct, Civility in the Workplace and

the TRAIT Core Values; that the Agency did consider the mitigating factor of the prior good work record and long time employment and the aggravating factor of the Grievant being a manager. However, the Hearing Officer concludes that the Grievant's behavior was comparable to the behavior set out in Grievant's Exhibit 6 of another Agency employee which resulted in a Group II Written Notice with a five day suspension.

The Hearing Officer further concludes that as to the Group III Written Notice regarding the Grievant's actions of contacting four employees (Grievant's Exhibit 3), the Agency proved by a preponderance of the evidence that the Grievant's conduct was in violation of Standards of Conduct, Civility in the Workplace and the TRAIT Core Values; that the Agency considered the mitigating factors of the Grievant otherwise good work record and long time employment and the aggravating matter of the Grievant being a manager; and that issuance of the Group III Written Notice and termination of employment was consistent with law and policy.

### DECISION

For the reasons stated herein, the Agency's Group III Written Notice regarding the Adobe meeting (Agency Exhibit 2) shall be revised to a Group II Written Notice with a five day suspension. The Agency's Group III Written Notice with termination regarding the Grievant contacting employees (Agency Exhibit 3) is upheld.

### APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resources Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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

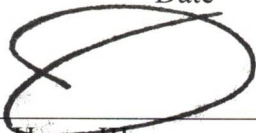


compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 9/1/2023  
Date



\_\_\_\_\_  
John R. Hooe, III  
Hearing Officer

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