

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11958 and 11959**

Hearing Date: July 13, 2023
Decision Issued: July 21, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed effective April 17, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on April 25, 2023 and the Grievance Hearing was scheduled for July 13, 2023, with a copy of all exhibits and list of witnesses to be provided no later than July 6, 2023.

The Grievance Hearing was conducted on July 13, 2023 as scheduled.

The grievance hearing addressed the following Written Notices:

- Group II Written Notice issued January 17, 2023 for multiple alleged offenses occurring between November 25, 2022 and January 4, 2023 (No additional discipline).
- Group II Written Notice issued March 22, 2023 for multiple alleged offenses occurring between March 2, 2023 and March 6, 2023 with termination of employment.
- Group II Written Notice issued March 22, 2023 for multiple alleged offenses occurring between March 6, 2023 and March 9, 2023 with termination of employment.
- Group III Written Notice issued March 22, 2023 with multiple alleged offenses occurring between March 6, 2023 and March 9, 2023 with termination of employment.

APPEARANCES

Grievant

Agency Party Designee

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 four written notices?
2. As to the Group II Written Notice issued on January 17, 2023 and the two Group II Written Notices issued on March 22, 2023, in each instance did the Grievant's conduct constitute a Group II violation under the Standards of Conduct?
3. As to the Group III Written Notice issued on March 22, 2023, did the Grievant's conduct constitute a Group III violation under the Standards of Conduct?
4. Whether the Agency considered mitigating and aggravating factors as to each written notice?
5. 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 1-27.

The Grievant's Exhibits admitted into evidence are contained in one notebook with a tab for each of the four written notices.

FINDINGS OF FACT

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

The Agency employed Grievant as an HR Operations Manager with such employment governed by the following:

- DHRM Policy 1.60 Standards of Conduct (Agency Exhibit 7)

- Agency Mission statement and Code of Ethics (Agency Exhibit 8)
- DHRM Policy 2.35 Civility in the Workplace (Agency Exhibit 9)
- Grievance Procedure Manual (Agency Exhibit 10)

The Agency's first witness as the Human Resource Manager III, Director-HR and the immediate superior and supervisor of the Grievant, an HR Manager. The witness testified that the witness had been employed at the Agency for four and a half years and had been in the field of Human Resources for twenty-five years, nineteen years with the Commonwealth of Virginia. The witness reviewed the Grievant's work profile and the percentage allocation of core responsibilities as well as the EWP Attachment-Program Manager Self-Tracking Form. (Agency Exhibit 12 and 13) The witness emphasized that in addition to the Standards of Conduct, the Grievant was required to abide by the Mission Statement and Code of Ethics (Agency Exhibit 8).

The witness testified that the Grievant began employment on June 10, 2022 and was included in a management team of three (including the Grievant) which met weekly. The witness testified that the witness began receiving various complaints from staff in the early weeks of Grievant's employment. Reviewing the Grievant's Performance Evaluation conducted on November 30, 2022 (Agency Exhibit 14) the witness pointed out that although the Grievant received either a contributor or strong contributor in each category, there were multiple comments including the evaluation noting that the Grievant needed improvement in the following areas: demonstrate self-awareness, cultivates productive work relationships, understands the business and communicates proficiently. In addition, the performance evaluation noted the following: "[Grievant] has had some difficulty with [Grievant's] interactions with [Grievant's] colleagues; [Grievant] needs to be more proactive with monitoring and managing the recruitment workflow for the HR Generalist assigned to [Grievant's] team; [Grievant] did not take my feedback well nor some of the additional feedback from the team. This resulted in me having to directly address the interaction with [Grievant] and my expectations for how we would interact and give/take feedback moving forward."

The witness went on to say that the Grievant's response to the performance evaluation was concerning (Agency Exhibit 14, Page 6):

And, it should be noted that per the HR Director these two employees are known for being opinionated about people and would be most resistant to change. I will also note that out of the staff of 5 people to ask about working with me (to provide info for my evaluation-I guess), the HR Director only picked these two to census.

The witness noted that the statement by the Grievant was false and that the witness did not only pick two to census. The Hearing Officer notes that the witness also redacted the Grievant's comments in his response (Agency Exhibit 15) because other employees could have read Grievant's comments in his response and been negatively impacted. Hearing Officer notes

that this the first time that the Hearing Officer has known of a supervisor redacting comments in an employee's response to a performance evaluation.

The witness next testified as to the Group II Written Notice issued January 17, 2023 (citing unsatisfactory performance, failure to follow instructions or policy and willful misconduct). The Written Notice stated "In summary, your actions include, but were not limited to the following: in your evaluation response you wrote derogatory comment...; you failed to provided Agency leadership with an accurate work product which resulted in an employee that you supervised having to complete the project you were assigned; you failed to utilize the HR shared drive (U-drive) to save working documents after being instructed to on numerous occasions, both verbally and in writing...; after numerous reminders to all HR staff, you failed to enter your leave on the shared calendar and inform all the employees that are relying on you for supervision and/or guidance that you are going to be on leave...; you failed to complete the Knowledge Transfer Exercise with a former employee that you supervise after I instructed you to do both verbally and in writing; you failed to follow through with on-boarding a new employee by ensuring that she had the access and training that she needed of the PRIMARY system that she needs access to in order to perform ALL the essential functions of her job; you failed to ensure that a new employee, who was promoted to a higher role in the higher level duties, was sufficiently trained to perform the critical duties of her job, including employee payroll; you failed to actively monitor the work of those employees that you supervise, even after my repeated feedback that work assignments were not completed. Your conduct shows disregard for DEQ Values, expectations of conduct as outlined in the DEQ Code of Ethics and lack of respect for Agency leadership, me as your supervisor, your colleague, and subordinates. Your expected to serve as a role model through your compliance with Agency protocols and best practices in leading and communicating with your subordinate employees."

The witness then reviewed the specifics of the alleged violations as set out in the Due Process Memorandum dated January 4, 2023 (Agency Exhibit 2, Page 4-14). The witness supported the various allegations by referring to Agency Exhibit 17 regarding the problems with U-drive; Agency Exhibit 18 and Exhibit 19 regarding the "huge" project involving Organizational Charts, specifically reviewing the email thread pages 22-26 of Exhibit 19. In addition, the witness referred to Agency Exhibit 21 in discussing Grievant's failure to enter the Grievant's leave properly on HR calendar, failing on three occasions to do so.

The witness further testified that the Grievant did not follow the witness's instructions in completing the Knowledge Transfer Exercise, for which the witness included a link to the guide document for the Grievant to use.

The witness went on to testify regarding the witness's frustration with the Grievant not properly and timely assuring that an employee gained Cardinal user access. The witness reviewed the relevant email threads at Agency Exhibit 23. In addition, the witness testified as to the Grievant's failure to deal with a Wage Timesheet Report issue that caused another employee

to work at night to assure that certain employees got paid. Specific reference was made to the email thread at page 28 of agency Exhibit 23. In conclusion, the witness testified that in issuing the single Group II Written Notice, rather than multiple Written Notices, mitigation was considered in the way of the employee's otherwise good work record but also the aggravating circumstance of the content of the Notice of Improvement needed/Substandard Performance issued by the Department of Corrections on August 10, 2021, citing behavior by the Grievant which if substantiated at the Grievant's present Agency would have possibly resulted in termination.

The Agency's second witness was the Director of Administration for the Agency who had a strong background in auditing. In the Agency organization chart, the witness reports to the Agency Head (Agency Exhibit 11, Page 1).

The witness then testified at length referring to the witness's notes from interviews with the Grievant, Grievant's supervisor and two other employees (Agency Exhibit 26). The witness noted that the Exhibit sets out in black the responses or arguments made by the Grievant and sets out in blue the witness's notes regarding the witness's interviews with the Grievant and the other employees. When interviewing the Grievant, the Grievant was asked about the relief requested by the Grievant "Group Notice be rescinded, and I be given an equitable opportunity to be successful with no treat or action of retaliation or hostility moving forward." When asked if the Grievant believed that the Grievant had been retaliated against or was being treated in a hostile manner, the Grievant said "yes, all of this" has been hostile. When the witness asked for clarification and examples, the Grievant said everything about this has been hostile and others are noticing it as well. The witness asked what others have noticed and the Grievant replied that an individual in HR has come to the Grievant to let the Grievant know that she went to [Grievant] supervisor and expressed her concerns that [Grievant] was being singled out, treated unfairly, and that there is hostility that [Grievant] supervisor has instigated with [Grievant]. The witness followed up with Grievant's supervisor asking if any employee had come to the supervisor expressing concerns about a hostile work environment or expressing concerns about Grievant being treated hostilely or unfairly. The Grievant's supervisor told the witness that no one had made any such comment or complaint to the supervisor. When the witness followed up with the Grievant asking the Grievant to identify the individuals who had made the comments to the Grievant and to the Grievant's supervisor, the Grievant identified a specific employee. When the witness then followed up with that employee, the employee denied that the employee ever had the conversation with Grievant's supervisor, and that the employee did not feel that way or witness any such behavior from the supervisor.

The witness testified that he concluded that the Grievant demonstrated a pattern of dishonesty, with the single instance of the Grievant falsely claiming that a specific employee had complained to Grievant's supervisor about the hostile work environment would be grounds for a Group III with termination. As a result, the witness "called up the line for an opinion." The witness testified that the Group III Written Notice was issued indicating that the Grievant had

demonstrated falsification of the official grievance records by willfully making false statements, orally during the second step meeting. The Group III Written Notice charged that the Grievant failed to follow multiple policies of the most serious nature; disruption of the workplace; falsifying records; and unethical conduct/misconduct that is of a most serious nature and significantly impacts Agency operations. In support, the witness testified that the Standards of Conduct require that employees resolve work-related issues and disputes in a professional manner and through established business processes; make work-related decisions and/or take actions that are in the best interest of the Agency; conduct themselves at all times in a manner that supports the mission of their Agency and the performance of their duties. The witness testified that the Standards of Conduct further expect supervisors and managers to serve as role models through their compliance with policies, Agency protocols and best practices in leading and communicating with their subordinate employees (Agency Exhibit 7, Page 4 and 5). The witness testified that the Grievant violated these Standards of Conduct as well as the Grievance Procedure Manual which sets out that the procedure is not to be used to harass or otherwise impede the efficient operation and that parties and advocates shall not engage in conduct that offends the dignity and decorum of the grievance proceedings, including, but not limited to, the second step fact-finding meeting...(Agency Exhibit 10, Page 5 and 8). The witness further testified that the Standards of Conduct set out a glossary of offenses which set out behaviors which constitute disruptive behavior/disruption of the workplace, falsification and fraud. The witness testified that the Grievant's behavior did in fact fall under each of these three categories.

The witness testified that as to issuing the Group III Written Notice mitigation was considered in the way of the positive aspects of the Grievant's performance evaluation, which mitigation was offset by the aggravating consideration that the Grievant's actions negatively impacted the Grievant's credibility as a supervisor/manager subordinate.

The witness concluded by reviewing the two Group II Written Notices issued on the same day as the Group III Written Notice. As to the Group II Written Notice set out at Agency Exhibit 5, again the Grievant made false statements regarding follow-up on user access for one of Grievant's new employees. Again, false statements by a supervisor being of the most serious nature and justifying termination of employment. As to the Group II Written Notice set out at Agency Exhibit 6, it was concluded that the Grievant failed to provide the full response documentation as requested during the Due Process Procedure and constituted willful misconduct demonstrating disregard for DEQ Values (7Cs), expectations of conduct as outlined in the DEQ Code of Ethics, and a lack of respect for Agency leadership and Grievant's supervisor, colleagues and subordinates and justifying termination.

The Agency's final witness was the employee the Grievant identified as being the employee who complained about harassment. The witness testified that the witness did not make any statement about a hostile work environment; never witnessed Grievant's supervisor being hostile to the Grievant or any other employee and did note however that an employee who left the Agency did not give the Grievant certain things the Grievant needed. The witness testified

that the witness was very upset by the Grievant's false statement and that the witness went home and cried.

The Agency rested their case and the Grievant then testified, briefly, responding to each allegation.

The Hearing Officer notes that the Grievant's exhibit notebook did not include anything which was not included in the Agency exhibit notebook. During the Grievant's testimony the Grievant simply reviewed the Grievant's earlier responses in the Due Process Proceeding and emphasized that each and every allegation was based on a mistake, misinterpretation or miscommunication. However, the Grievant did not rebut the Agency's second witness who testified in detail about the witness's interview with the Grievant during the Due Process Procedure. By not disputing or rebutting the information set out at Agency Exhibit 26, namely that Grievant made false statements and when given the opportunity to provide any information which would support Grievant's statement, did not or could not.

In closing, the Agency's Attorney outlined the evidence against the Grievant as follows:

- As to the U-Drive instructions, the testimony and the exhibits in the way of email threads show that the Grievant received instructions and failed to follow instructions regarding the U-Drive
- The Grievant stated that the organization charts had all been updated and published when they had not (Agency Exhibit 18, Page 1)
- Grievant did not utilize the link regarding knowledge transfer provided to him by the Grievant's supervisor
- The Grievant failed to prioritize dealing with a Cardinal access issue which caused another employee to spend time to get the matter resolved when it should have been the Grievant's responsibility

The Agency Attorney went on to argue that each of the above would have supported a separate Group II Written Notice. In addition, it was argued that the Grievant's false statement regarding an employee having a hostile environment weaponized the grievance process and justified a Group III Written Notice with termination. In addition, the Agency Attorney argued that the remaining two Group II Written Notices were justified and unrebutted by the Grievant.

By way of final statement, the Grievant responded to the Agency Attorney's final statement by repeating some of his earlier testimony and arguments.

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 first Group II Written Notice, issued on January 17, 2023, the Agency proved by a preponderance of the evidence each item of misconduct set out in the written notice and that such misconduct constituted unsatisfactory performance, failure to follow instructions or policy and a lack of respect for Agency leadership, the Grievant’s supervisor, colleagues and subordinates (violations of the Standards of Conduct); that the Agency did consider the mitigating factor of the Grievant being a

contributor on the Grievant's performance evaluation.

The Hearing Officer further concludes that as to the Group II Written Notice regarding the Grievant's verbal testimony regarding follow-up on user access for one of Grievant's new employees and as to the Group III Written Notice regarding the Grievant's false testimony during the second step resolution meeting, the Agency proved by a preponderance of the evidence that the Grievant's conduct was in violation of the Standards of Conduct specifically making false statements and unethical conduct of the most serious nature and significantly impacting Agency operations in that the Grievant was a manager and role model; that mitigating and aggravating matters were considered; and that termination of employment in each instance was consistent with law and policy.

Finally as to the Group II Written Notice regarding Grievant's failure to provide Attachment A of the First Step Response in the Grievant's procedure, the Hearing Officer concludes that the Agency proved by a preponderance of the evidence that the Grievant's conduct was a violation of the Standards of Conduct, namely failure to follow supervisor instructions and violation of the grievance procedure manual code of conduct in civility; that the Agency did consider the mitigating and aggravating circumstances; and finally that the written notice issued with termination of employment was consistent with law and policy.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice with termination, the Agency's two Group II Written Notices with termination and the Agency's original Group II Written Notice with no additional discipline are all 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 14th St., 12th Floor
Richmond, VA 23219

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

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

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

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

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 6/21/2023
Date



John R. Hooe, III
Hearing Officer

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

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

Office of Employment Dispute Resolution

**DECISION OF HEARING OFFICER
UPON REMAND
(Ruling 2024-5601)**

Remand Decision Issued: October 4, 2023

PROCEDURAL HISTORY

The Decision of the Hearing Officer issued July 21, 2023 was remanded for reconsideration by Ruling Number 2024-5601, issued September 25, 2023.

The Ruling remanded for reconsideration of the Third and Fourth Written Notices but found no reversible error as to the First and Second Written Notices.

**FINDINGS AND CONCLUSIONS
UPON RECONSIDERATION**

As to the Third Written Notice, upon reconsideration of the record, the Hearing Officer concludes that the evidence does not support finding that the Grievant intentionally misrepresented the Grievant's evidence to management during the second step of the grievance process.

As to the Fourth Written Notice, in accordance with the EDR conclusion set out in the Ruling that the Hearing Officer's findings are not consistent with policy, upon reconsideration of the record and policy, the Hearing Officer concludes that the evidence does not support disciplinary action against the Grievant for non-compliance with the grievance procedure.

**DECISION
UPON RECONSIDERATION**

The original Decisions of the Hearing Officer regarding the First and Second Written Notices were not remanded for reconsideration.

For the reasons stated herein, upon reconsideration of the record and policy, and the Hearing Officer's conclusion set out above, the Third and Fourth Written Notices are not upheld.

APPEAL RIGHTS

Either party may request an administrative review by EDR of this reconsideration decision on any new matter addressed in this remand decision (i.e. any matters not resolved by the agreed decision). Any such request must be received by EDR within **15 calendar** days of the date of the issuance of the remand decision.

Please address your request to:

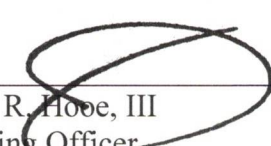
Office of Equal Employment and Dispute Resolution
Department of Human Resources Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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.

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided. Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the Circuit Court in the jurisdiction in which the grievance arose. Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.

ENTERED: 10/4/2023
Date



John R. Hooe, III
Hearing Officer