

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 12001

Hearing Officer Appointment: August 28, 2023

Hearing Date: October 2, 2023

Decision Issued: October 12, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant is a Senior IT Specialist at Virginia State University (“VSU” or the “Department” or the “Agency”). The Grievant requested an administrative due process hearing to challenge the issuance on March 17, 2023, of a Group II Written Notice, by management of the VSU as described in the Grievance Form A dated May 12, 2023.

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

On September 5, 2023, at 2 pm, the parties held a first prehearing conference call via Zoom. The Grievant, the Agency attorney and the hearing officer participated in the call.

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

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

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

At the hearing, the hearing officer received various documentary exhibits into evidence, namely exhibits 1-9 (Bates-numbered 1-107) in the Agency's exhibit binder.<sup>1</sup>

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

The hearing officer recorded the hearing.

### APPEARANCES

Representative for Agency  
Grievant  
Legal Counsel  
Witnesses

### FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by VSU as a Senior IT Specialist.
2. On March 9, 2023, the Grievant was setting up a laptop for an employee who had previously worked remotely and was visiting the campus for the first time ("S").
3. While Grievant was setting up Adobe on her computer, S witnessed an obscene image on Grievant's VSU laptop screen. It was an image of a woman kneeling with her mouth open and tongue out; and the words, "F##K my mouth harder."

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<sup>1</sup> References to the agency's exhibits will be designated AE followed by the exhibit number and/or page Bates number. The Grievant did not offer any exhibits.

4. S expected the Grievant to close the page but apparently, he was oblivious that it was left open. On the way to the airport, S reported the incident to Grievant's supervisor, and this Group II Written notice ensued.
5. VSU investigated the claim by way of a computer diagnostic assessment or forensic scan.
6. The results of the forensics scan indicated that there were connections that were used by Grievant's device, but due to the use of an unauthorized external VPN (not managed by VSU IT), which could have been accessed by URL, the Chief Information Security Officer ("CISO") was not able to determine who was using the device at the time of the downloads.
7. The unauthorized VPN on Grievant's computer masked the activity. The use of the unauthorized VPN bypassed VSU IT Security and normal protocols, which is a violation of VSU's acceptable use policy.
8. The investigation summarized its findings: "We can verify that unauthorized content has been accessed and downloaded from this IP, but due to the use of the VPN client, we cannot verify who was using the IP address. We can verify, however, that the client has used that IP address before". AE at 9.
9. On March 17, 2023, the supervisor issued the Grievant a Group II Written Notice for accessing inappropriate content on his VSU computer and for violation of VSU's Acceptable Use Policy.
10. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.

11. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
12. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
13. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

#### APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act*, *Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

*Va. Code* § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have

access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the “SOC”). AE 4. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Grievant did not follow state and agency policies concerning his critical agreed to work duties.

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

Under the SOC, employees are expected to comply with written policy or agency procedures.

VSU’s Acceptable Use Policy provides in part:

... All users of electronic resources and systems are expected to use the University's electronic resources and IT systems in a professional manner that demonstrates respect for confidentiality, integrity and availability of data, and intellectual property rights. All users also accept personal responsibility for any actions that constitute a violation of this policy...

2. All members of the University community are expected to use the University's electronic resources and IT systems in a professional manner that demonstrates respect for confidentiality, integrity and availability of data, and intellectual property rights.
3. All uses of electronic resources and systems must be for their intended use and such use must comply with applicable local, state, and federal laws, copyright laws, and University policies.
4. Users of the University's electronic resources and systems accept personal responsibility for any actions that constitute a violation of this policy.
5. Personal use of the University's electronic resources and systems is permitted only when such use is incidental and occasional. Personal use is prohibited when:
  - a. It interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
  - b. It adversely affects the efficient operation of the computer system; or,
  - c. It violates any provision of this policy.
6. In making acceptable use of University IT systems and resources, IT system users are prohibited from, and NOT allowed to:
  - a. Install or use proprietary encryption hardware/software on University's IT computers.
  - b. Tamper with or disable security controls configured on the University's computers, workstations or mobile devices...
  - g. Access, download, print, or store information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001).
  - h. Download or transmit fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images...
7. Privacy Statement
  - a. There is no expectation of privacy in any message, file, image, or data created, sent, retrieved, or received by use of the University's electronic resources and systems.

AE at 77-78.

Clearly, as explained by the CISO, who has numerous certifications and 20 years' experience at VSU, the Grievant violated the Acceptable Use Policy and the disciplinary infractions were reasonably classified by management as a Group II offense.

The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the

Agency's attorney that the various offenses are appropriately classified at the Group II level with the Agency appropriately exercising the discipline.

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

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

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in the

Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the demands of the Grievant's work environment;
2. the Grievant's long tenure at the Agency;
3. the effect of the COVID-19 pandemic;
4. the Grievant's past good service to the Agency; and
5. the Grievant's lack of formal discipline prior to March 17, 2023.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

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

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 (4<sup>th</sup> 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 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.<sup>[1]</sup>

ENTER 10/12/2023

*John Robinson*

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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).

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.