

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 11605

Hearing Officer Appointment: July 3, 2023  
Hearing Dates: September 7, 2023  
&  
October 17, 2023  
Decision Issued: November 10, 2023

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently a Network Engineer at the University of Virginia (“UVA” or the “University” or the “Agency”). The present hearing officer was appointed by EDR effective July 3, 2023. However, the proceeding had already been going on for some time under the auspices of a different hearing officer (the “First Hearing Officer”), who withdrew. Several compliance rulings from the Department of Human Resource Management’s Office of Employment Dispute Resolution (“EDR”) have been issued, including EDR Ruling Numbers 2023-5535 & 2023-5536 (March 28, 2023); EDR Ruling Number 2023-5552 (April 27, 2023); EDR Ruling Number 2023-5564 (June 6, 2023); and EDR Ruling Number 2024-5618 (October 3, 2023). All of these compliance rulings are incorporated herein by this reference. Accordingly, a brief procedural history is warranted.

On or about January 25, 2023, the Grievant filed an expedited grievance with the Agency challenging his receipt of a Group II Written Notice, dated January 6, 2023. The January 6, 2023 Written Notice identified two issues of failure to follow instructions or policy: 1) the Grievant

failed to enter certain paid time off (PTO) requests into the Agency's system, and 2) the Grievant failed to follow instructions to order a new computer due to the Grievant's apparent inability to connect to the Agency's virtual private network (VPN) while working from home.

The University did not respond to the January 25 grievance initially and the Grievant was terminated based on two additional Written Notices, each issued on February 17, 2023. Upon bringing this issue to the University's attention, the initial step respondent provided a written response on the grievance form, dated February 23, upholding the Group II Written Notice. No meeting was held to address the January 25 grievance.

Shortly thereafter, the University appears to have realized the procedural anomalies and sought to correct the failure to adhere to the grievance procedure. A new step respondent was identified, and a meeting was held with the Grievant on or about March 6, 2023.

The step respondent provided a written response, again upholding the Group II Written Notice, on March 13, 2023. The step respondent rescinded the original Written Notice and replaced it with a new Group II Written Notice with a re-issued date of March 13, 2023.

Though more details are included, the reissued Written Notice identified essentially the same two issues of failure to follow instructions or policy: 1) the grievant failed to enter certain PTO requests into the Agency's shared calendar, and 2) the Grievant failed to take steps to resolve the technology issues that prevent him from appearing on webcam during virtual meetings or connecting to the Agency's VPN.

The Grievant contested the reissued Written Notice as a compliance challenge to the grievance process. At the same time, the University sought to consolidate the January 25 grievance with the Grievant's two dismissal grievances of February 17 that were filed with EDR.

In EDR Ruling Numbers 2023-5535, 2023-5536, EDR determined that the University's decision to reissue the Written Notice did not fail to comply with the grievance procedure. More specifically, EDR ruled that "[b]oth versions appear to address the same courses of conduct by the grievant, though worded differently" and that any changes were not "so significant to rise to the level of noncompliance with the grievance procedure." *See*, Ruling at 3. In effect, both the January 6 and March 13 Group II Written Notices covered the same issues: Grievant's failure to follow instructions regarding the group calendar and his failure to resolve his computer issues.

EDR also consolidated the grievances for a single hearing once the January 25 grievance completed the resolution steps.

The Grievant appears to have not initially proceeded with the January 25 grievance after receiving the March 13 response from the step respondent and the reissued Written Notice.

On April 13, 2023, the University notified EDR that it was waiving the remaining steps and sent the grievance paperwork to EDR for the January 25 grievance to join the dismissal grievances for the consolidated hearing. The parties and EDR exchanged correspondence about the procedural aspects of the case. Further, the Grievant submitted a new grievance to the University on April 14, 2023, seeking to challenge the reissued Written Notice. A phone conference was held between EDR and the parties on April 18, 2023. The result of that conference was essentially that the parties would agree to consider the April 14, 2023 grievance as an amendment to the original January 25 grievance and as a continued challenge to the reissued Written Notice.

The University reviewed the April 14, 2023 grievance paperwork (amendment) and objected to qualification of the amended grievance for hearing in certain respects. The Grievant disagreed with the University's position, resulting in EDR Ruling Number 2023-5552.

The University asserted that the Grievant's allegations of "paid leave violations" were not qualified. In the Grievant's April 14, 2023 grievance amendment, the Grievant alleged that there were three days he had sought and was approved to take leave. The Grievant alleges he was later told to change his plans and allegedly did not take the leave. However, according to the Grievant, because the leave was already in the system, leave was deducted from his balance and a correction was not made. Both the original and reissued Written Notice includes a three-day suspension for January 9-11, 2023. The Grievant alleges that his supervisor issued the three-day suspension to essentially get back the three days the Grievant had been asserting he lost as paid leave.

Because the Grievant's challenge to the reissued Written Notice was qualified for a hearing, EDR deemed the Grievant's challenge to the loss of paid leave as qualified for hearing as well. The Grievant has sought to have 24 hours of leave and/or pay provided as relief in his grievance; the original grievance appears to have included such a claim, so EDR concluded that this was not a newly added issue. However, it is important to note at the outset that the Grievant bears both the burden of production and the burden of persuasion concerning this issue. For reasons provided below, Grievant did not sustain his burden of proof.

EDR recognized that the Grievant also raised additional procedural arguments surrounding the reissued Written Notice and certain affirmative defenses. EDR ruled that because the amended grievance is qualified for hearing, the Grievant could raise at the hearing the affirmative defenses asserted in the amended grievance such as retaliation, due process, and the PTO issue identified above.

EDR also ruled that the grievance as amended remains subject to the consolidation determination expressed in EDR's prior rulings and, as such, may be heard in conjunction with

all other matters pending before the newly appointed hearing officer.

The Grievant asserts in his grievances that he did not violate any codes or policies and that the discipline is not warranted or appropriate. The Grievant seeks reinstatement, removal of the written notices from his record and other relief, as asserted in each Form A.

On July 7, 2023, at 10 am, the parties held a first prehearing conference call via Zoom. The Grievant, the Agency's advocate and the hearing officer participated in the call. Following the conference call, the hearing officer entered his Scheduling Order of July 8, 2023, which is incorporated herein by this reference.

The Scheduling Order provides, in part:

**“EXCHANGE OF EXHIBITS AND WITNESS LIST:**

**Before 5:00 p.m. on August 31, 2023**, the parties shall exchange between them and deliver to the hearing officer their proposed exhibits and the names of their proposed witnesses. To clarify this direction, “exchange” as used herein means each party shall ensure that he or she delivers by hand, overnight courier, **physical receipt** of U.S. Mail (Standard or Priority), e-mail or other appropriate form of electronic delivery, his or her proposed exhibits and the names of his or her proposed witnesses to the other party.

**In the event the parties deliver their documents electronically, they will also deliver to the hearing officer a binder of hard copies no later than 5 pm the day before the hearing.**

Each party is responsible for notifying its own witnesses and securing the attendance of their witnesses at the hearing. Any party wanting the hearing officer to issue any Order for Witness or any Order for Documents should send to the hearing officer a written request, specifying the name and address of any witness or custodian of records and documents requested, as soon as possible but, in any event, to be received by the hearing officer no later than **5:00 p.m. on August 3, 2023**.

The hearing officer encourages the parties to bates-number or number each page of their respective exhibits for ease of reference, particularly in the remote hearing context.”

Scheduling Order, at 6-7 (emphasis in original).

As part of its Compliance Ruling No. 2024-5618 of October 3, 2023, EDR recognized:

EDR has reviewed the entirety of the record in this matter to date, including the audio recording of the September 7 proceedings, which were held by remote video conference. Our review of the audio indicates that the hearing proceeding became extraordinarily contentious when the grievant began to present his case –

largely due to confusion regarding the grievant's proffered documentary exhibits, which apparently were not numbered, tabbed, or otherwise organized for reference.<sup>10</sup> The hearing officer then determined that he had not received the same documents from the grievant as the university had, and his copy of the grievant's evidence did not include all of the documents the grievant sought to introduce.<sup>11</sup> Although the hearing officer nevertheless attempted to admit the grievant's documents in an orderly fashion, none of these attempts proved to be feasible.<sup>12</sup> During discussion about how to approach this issue, the grievant responded to the university's statements with exclamations such as "f\*\*\* this s\*\*\*!" and "holy f\*\*\*ing s\*\*\*!"<sup>13</sup>

UVA, by counsel, objected to the admission of all of the documents which Grievant sought to introduce at the hearing (other than UVA-generated documents), because UVA could not determine whether it had ever received the documents as part of the Grievant's electronic submission of documents previously submitted pursuant to the August 31, 2023 exchange deadline in the Scheduling Order. Ultimately, the hearing officer sustained UVA's objection, ruling that only UVA-generated documents which the Grievant sought to introduce into evidence at the hearing on October 17, 2023 (to which UVA had withdrawn its initial objection) were admitted and the other documents referenced by the Grievant were excluded because the participants could not identify and reference them during the hearing and because it would not be feasible during the hearing to determine whether such documents were previously part of Grievant's August 31 electronic submission.

The Supreme Court of Virginia looks with favor upon the use of scheduling orders, stipulations and other pre-trial (or in this proceeding, pre-hearing) techniques which are designed to narrow the issues, promote fairness or foster settlement of litigation. *McLaughlin v. Gholson*, 210 Va. 498, 500, 171 S.E.2d 816, 817 (1970). The Scheduling Order in this proceeding and, specifically, the parties' stipulated deadline concerning exchange of witness lists and exhibits, was a set of rules which the parties agreed to live by and constituted precisely such a pre-hearing

technique. To have allowed the Grievant to surprise UVA at the hearing with documents it had not seen would have thwarted the rules the parties themselves agreed to abide by and violated fundamental principles of fairness, notice and due process.

In *City of Hopewell v. County of Prince George, et als.*, 240 Va. 306, 314, 397 S.E.2d 793, 797 (1990), the Supreme Court of Virginia specifically left open the question whether the trial judge in that case even had the discretion had to allow a rebuttal witness to testify where Petersburg had not previously named such witness in accordance with the court's pretrial order entered January 30, 1989. In any event, the Court decided that the trial judge clearly had not abused his discretion in refusing to allow such witness to testify even under circumstances where Petersburg was arguing that there were good reasons why the witness was not named on the witness list filed by the deadline in the pretrial order.

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

At the hearing, the Grievant represented himself and the Agency was represented by its attorney. The hearing was held via ZOOM. All UVA exhibits 1-58 were admitted without objection. UVA-generated documents within the electronic exhibits submitted and exchanged by Grievant on August 31, 2023 pursuant to the Scheduling Order and otherwise proffered by the Grievant at the hearing on October 17 were admitted – all other exhibits proffered by Grievant were excluded. <sup>1</sup> Both parties submitted briefs after the hearing.

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<sup>1</sup> UVA exhibits are designated AE <followed by the exhibit number and/or page number>. Where ascertainable, Grievant exhibits are designated GE <followed by description>.

## 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 the Agency as a network engineer.
2. The Grievant began working for UVA on March 6, 2020, reporting to W.
3. On November 9, 2021, W issued a Letter of Counselling/Expectations requiring, amongst other things, Grievant to be logged into the VPN during work hours in order to adequately perform his job duties, and to be in regular communication with Grievant's supervisor (W at this time) to keep his supervisor apprised of the progress of any of Grievant's projects. AE 45 at page 310.
4. UVA kept Grievant well informed concerning its reasonable work expectations and UVA followed a course of progressive and situationally appropriate discipline that objectively and consistently addressed Grievant's behavior.



5. On March 31, 2022, W completed a CY21 Academic Year-End Narrative Review (AE 55, pages 377-8) noting, among other things, that Grievant "Does not participate in daily operational activities, Does not consistently log into work , , .Has been given counseling on 'showing up to work' and being available online ... is not working at a Sr. Level Engineer skillset , , ,"
6. W left UVA employment on May 2, 2022.
7. L, Assistant Vice President for Enterprise Infrastructure, then served as the Grievant's Manager on an interim basis.
8. On May 18, 2022, L provided a Performance Improvement Plan ("PIP") to Grievant. One component of the PIP was for Grievant to "[b]uy a webcam so that you can participate F2F ("face to face") in Zooms (EI will pay for this)." AE 48, page 332.
9. On June 17, 2022, L issued Grievant a Group I Written Notice to Grievant for "Failure to Follow Instructions" and "Disrespectful Behavior." AE 58.
10. An email is attached to this Written Notice in which Grievant tells L "[I]f I get this project done... You have to resign and leave UVA immediately (within a week of my project completion)," AE 58, page 419.
11. B began managing Grievant on November 7, 2022.
12. On November 17, 2022, B was managing about 12 people, including Grievant.
13. Grievant worked for UVA on a full-time remote basis from his home.
14. From November 9-14, 2022, encountering much resistance, B sent numerous emails to Grievant to set up meetings with Grievant in order to introduce himself

and to ascertain Grievant's workload and progress on assigned projects. *See, e.g.*, AE 17.

15. B repeatedly instructed Grievant to meet via Zoom with the camera on (*e.g.*, AE 14 & 15, pages 155, 160).
16. Grievant consistently failed to cooperate with B's reasonable instructions, responding avoidantly or with disrespect. *See*, AE 14, page 152 in which Grievant states that "C [B's boss] just took his foot out of my ass" and Grievant's instruction to B to pick a meeting time after 6 pm.
17. In response, B patiently counseled Grievant about the necessity of meeting one on one with the camera on, during work hours when B is available.
18. B had absolutely no difficulty scheduling meetings with the 11 other network engineers/IT professionals B supervised.
19. On November 16, 2022, B instructed Grievant to have Grievant's computer repaired or replaced "ASAP" so that the two of them could meet via video. AE 16, page 161. Grievant was also instructed to order a new computer to cure his inability to connect to UVA's VPN. AE 1 at 27.
20. On or slightly before November 16, 2023, Grievant properly requested to be off on November 18, 21, and 22 through Workday, UVA's official timekeeping system.
21. B sent 3 emails instructing Grievant to put it on the group calendar. AE 7, page 122.

22. B also sent Grievant a Slack message (UVA's instant messaging service) on November 16 at 3:40 pm instructing Grievant to put his time off on the team calendar. AE 8, page 125.
23. Grievant did not put his time on the calendar, as instructed. AE 9, page 140. Grievant's failure to share his calendar disrupted UVA IT operations and materially compromised IT support within the Agency because IT could not provide consistent coverage without knowing who was available to work. AE 1 at 11 & 27.
24. There is no evidence that Grievant worked on November 18, 21, and 22.
25. Grievant never produced any work product for those three days, nor did he ever inform B that he was working those three days.
26. Grievant did not follow B's instructions to put his time on the group calendar.
27. The record is also replete with multiple instances of Management instructing Grievant to appear face to face via Zoom.
28. Grievant did not follow Management's instructions to appear on camera.
29. Accordingly, for Grievant's disciplinary infractions essentially all revolving around Grievant's unmitigated failure to follow instructions, described above in ¶¶ 15-28, B issued to Grievant a Group II Written Notice on January 6, 2023.
30. As described above, the January 6 Written Notice is no longer operative because Management rewrote and reissued it on March 13 to correct some immaterial, minor errors and to make it clearer.
31. Exercising progressive discipline, when Grievant's behavior not only did not improve but began to deteriorate, UVA was compelled to issue 2 additional

Group II Written Notices, with termination due to accumulation, on February 17, 2023. AE 28 & 33.

32. AE 28 details Grievant's continued egregious disrespectful behavior causing disruption to normal UVA workplace operations.
33. For example, Grievant repeatedly questioned the competency of B, his manager: "[B] you do not know what you are talking about" ( AE 28 at 232); " My advice is to double check your work and follow up with [C] before he has to follow up with you" (AE 28 at 234); "try asking [C] for management training" (AE 30 at 250); and "[B] does not know what he is talking about" (AE 31 at 256).
34. AE 33, the other Group II Written Notice dated February 17, 2023, was issued for Written Notice Offense Code 13, "Continued failure to follow instructions or policy."
35. Grievant refused to get his university-issued laptop serviced and functional for work use, as instructed innumerable times.
36. UVA presented multiple emails in which B instructed Grievant to have a functioning computer by contacting the helpdesk and getting a ticket for repairs. AE 34 at 266, January 12, 2023 "Please get a ticket going with the helpdesk ... "; AE 29 at 236, January 13, 2023 "On the desktop issue. I will ask yet again ... what is the ticket number... "; and AE 29 at 232, January 13, 2023, "5th time for same request. What is the ticket number for your laptop troubleshooting."
37. On January 17, 2023, Grievant finally opened two tickets. AE 36 at 270.

38. While IT Support responded promptly, Grievant never presented any substantive information to the IT Support team, which resulted in IT Support closing both tickets.
39. B testified that Grievant never produced any work product the entire three months they worked together and that managing Grievant was extremely time-consuming.
40. Each of the three Group II Written Notices describe egregious acts of misconduct having a significant adverse impact on UVA business operations.

GRIEVANT' S UNCIVIL BEHAVIOR & FAILURE TO FOLLOW INSTRUCTIONS  
DURING THE HEARING ON SEPTEMBER 7 & OCTOBER 17

41. As UVA asserts in its brief of October 24, 2023, consistent with the behavior described in the Group II Written Notices, EDR “found that Grievant refused to comply with the hearing officer's rulings, displayed an abusive approach toward multiple hearing participants, and in general displayed disregard towards the hearing officer's authority to maintain order in the proceedings. (See DHRM Ruling No. 2024-5618, October 3, 2023, page 4 of 5.)”
42. Contrary to complaints by Grievant that the hearing officer had not extended to him the same level of fairness and impartiality that he appeared to afford to UVA, EDR after its exhaustive review of the record to date found:

Upon a thorough review of the audio record, we identify no instance in which the hearing officer exceeded his authority to conduct the hearing in an orderly, fair, and equitable fashion; to admit relevant exhibits and exclude proffered evidence for good cause; and to create a complete grievance record. Moreover, we find nothing in the hearing officer's administration of the proceedings that suggests he harbors such a bias as to deny the grievant a fair hearing or that he should recuse himself for any reason. Although the hearing officer's tone of interaction with the

grievant was increasingly critical and stern, our review of the audio recording leads us to conclude that this tone was wholly in response to the grievant's refusal to comply with the hearing officer's rulings, his abusive approach toward multiple hearing participants, and his general disregard for the hearing officer's authority to maintain order in the proceedings.

EDR Ruling No. 2024-5618, October 3, 2023

43. Pursuant to the hearing officer's scheduling order, a hearing was held on September 7, 2023, but it was not concluded due to Grievant's profanity, treating participants in a discourteous and disrespectful manner, offending the dignity and decorum of the grievance proceedings, etc. On September 8, 2023, consistent with discussion during the September 7 proceeding, the hearing officer ordered that the continued hearing would proceed on October 17, 2023. The hearing officer specified that the grievant would have two hours during the continued proceeding to present evidence and argument, "provided he complies with DHRM's *Rules for Conducting Grievance Hearings* and *Grievance Procedure Manual* and [the hearing officer's] *Principles of Professionalism*."

44. The hearing officer stressed to the parties that the continuation of the hearing was not a "do-over" of exhibits, etc.

45. Nevertheless, before 2 pm on October 16, 2023, the day before the continuation of the hearing, Grievant delivered to the hearing officer a green binder of exhibits. However, no such exhibits were delivered to counsel for UVA. Apparently, the night before the hearing, Grievant exhibits were left at the UVA police station.

46. Similarly, no exhibits were provided for any witnesses. The Scheduling Order's Remote Protocols provide, in part:

In the event either party anticipates the possibility of wanting a particular witness to refer to a document, the parties should discuss the situation with each other and send the document to the witness. Further, the parties should check with these witnesses and if they are going to be referring to any document which is not going to be admitted as an exhibit, they should be sure to have a copy of that document in hand and also available to opposing party/advocate and the hearing officer so that opposing party/advocate and the hearing officer, if necessary, can review it before and/or during the course of the witness's testimony.

Scheduling Order at 8.

47. At the continuation of the hearing, the hearing officer sustained UVA's objection to the admission of Grievant's latest set of exhibits which counsel for UVA had not yet seen and did not have for the continuation of the ZOOM hearing on October 17, 2023.
48. After warning Grievant, when Grievant again insisted on engaging in conduct which undermined the integrity of the grievance process, the hearing officer ended the evidentiary component of the hearing. 10/17/23 RECORDING AT 1:07.
49. Examples of Grievant's uncivil, unprofessional and discourteous behavior on October 17 include:
  - (1) On being directed to ask questions of the witness by the hearing officer (RECORDING AT 16:56), Grievant responds: " Look bro I'm getting real upset with you honestly, honestly."
  - (2) On being directed again to ask questions and upon the hearing officer explaining the need to mute the witness when he won't follow direction and when he talks over everyone, Grievant exclaims: " ... I want my **damn** time back!" (RECORDING AT 17:10 ); " Well stop interrupting me! Would you just be quiet and be a judge! That's it! **DAMN! SHIT!**" (RECORDING AT 17:22)
  - (3) Upon the hearing officer sustaining Counsel for UVA's objection that a question had been asked and answered, Grievant to hearing officer and Witness 1 (UVA 's Associate Vice President & Deputy Chief Information Officer): "Of course, you would, you would sustain that." Then to Witness: "Ok [D], you can **get the hell off** my statement – please – bye." RECORDING AT 26.
  - (4) Above Witness 1 asks: "So it sounds like I'm to leave now?" Grievant in an extremely rude and dismissive tone immediately responds: "Yeah, go please. **Get the hell out the way!**" RECORDING AT 27.

- (5) HEARING OFFICER WARNING TO GRIEVANT (RECORDING AT 27:30):  
“ [Grievant], you’ve been warned about civility and courteousness and when you’re telling witnesses, “Get the hell out the way!” and you’re rude like that, and she was obviously shocked from her expression, I’ll give you one more warning but that’s it. I’m terminating this proceeding if you do anything remotely like what you just did.”
- (6) RECORDING AT 1:05. Upon hearing officer’s denial of Grievant’s motion to pause and continue hearing and hearing officer’s inquiry whether Grievant has any more question for Witness 2 (UVA Director of Academic Networks), Grievant asserts: “ The court is not giving me...It’s just because a white man saying ‘I don’t wanna do it.’”
- (7) RECORDING AT 1:06: Hearing Officer for the record and to ascertain whether there was any objection by UVA counsel, in the wake of unmitigated, belligerent argument by Grievant and Grievant’s steadfast refusal accept hearing officer decisions and to move on:  
“[Counsel for UVA], do you have any objection to me discontinuing the hearing and I’m just going to say to EDR that he just refused to follow direction going to the points that they made, you know to be courteous and we’ve got white men saying, and telling witnesses get the hell out and things, so I think I’ve just had enough. We’ve exhausted all our avenues of trying to give [Grievant] an opportunity to present his case. I did give him a warning -- I’ve probably given him more warnings than I should have but you know I did want to on the side of giving him every opportunity to comply but it’s become pretty much apparent that nothing is going to work.”

[The hearing officer’s quotes are his best efforts at transcribing the recording, which is for the most part relatively clear, but should be construed to read “words to the practical or substantial effect of.”]

50. As EDR has recognized, much of the testimonial evidence that Grievant elicited or gave was immaterial and irrelevant (EDR Ruling No. 2024-5618 at 3). Accordingly, by the time the hearing officer ended the hearing, Grievant had not addressed or developed his affirmative defenses and the PTO issue. Grievant certainly has not come close to sustaining his burden of persuasion on these matters. Furthermore, even if EDR were to accept all of Grievant’s documents, which contain a lot of argument, the assertions therein were not subject to cross-examination.

51. The Grievant's disciplinary infractions concerning this case did seriously negatively impact UVA's operations.



52. 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.
53. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
54. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
55. 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 57. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Grievant's disciplinary infractions were reasonably classified by management as 3 Group II offenses. 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 offenses are each appropriately classified at the Group II level with the Agency appropriately exercising the discipline. Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” A second occurrence normally should warrant termination. Failure to follow supervisor’s instructions and comply with agency policies and procedures are both specially listed as Group II offenses.

The importance of cross-examination in our adversarial system in ferreting out the truth cannot be overstated: “Cross-examination is the greatest legal engine ever invented for the discovery of truth.” John H. Wigmore quoted in *Lilly v. Virginia*, 527 U.S. 116 (1999). *See, also, Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

While the Grievant argues that the Agency's discipline was unwarranted under the circumstances, the hearing officer finds, to the contrary, that Management’s expectations were clearly communicated to the Grievant on multiple occasions. *See, e.g.*, Grievant had already received a Letter of Counselling/Expectations, a prior, still active Group I Written Notice (AE 58), and numerous informal counselings and corrections.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that each of the 3 asserted violations rose to the level of a Group II offense. Furthermore, typically accumulation of just 2 Group IIs result in termination – here there are 3.

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 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 Grievant's years of service to the Agency;
2. the demands of the Grievant's work environment;
3. the Grievant's remote work environment; and
4. the effect of the COVID-19 pandemic.

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 Agency issued to the Grievant significant prior counseling and correction in the past. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (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. The hearing officer also agrees with counsel for UVA that the University has displayed considerable leniency and patience to Grievant.

#### 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 11/10/2023

*John Robinson*

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John V. Robinson, Hearing Officer

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

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