COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 12023

Hearing Date: December 19, 2023
Decision Issued: December 26, 2023

PROCEDURAL HISTORY

On August 28, 2023, Grievant was issued a Group III Written Notice of disciplinary action, with termination. The offense was unsatisfactory performance and failure to follow instructions or policy on August 7, 2023, August 8, 2023, and August 10, 2023. Agency Exh. 6.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 10, 2023, the Office of Employment Dispute Resolution (EDR) assigned this grievance to the Hearing Officer. On December 19, 2023, a virtual hearing was held online.

The Grievant and Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits or Grievant's Exhibits, respectively.[1]

The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel for Agency
Witnesses

[1] A prehearing conference was held on December 18, 2023, to consider the Agency's objections to Grievant's Exhibits. Based on the hearing officer's consideration of the objections and ruling, the Grievant submitted substitute exhibits 10-17. Grievant's Exhibit 10, however, was withdrawn. The hearing record closed at the conclusion of the grievance hearing.

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

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

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

DHRM Policy 1.60, *Standards of Conduct*, requires employees, among other things, to:

- Perform assigned duties and responsibilities with the highest degree of public trust.
- Use state equipment, time, and resources judiciously and as authorized.
- Meet or exceed established job performance expectations.
- 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.

Agency Exh. 7. Under the Standards of Conduct, a Group I offense includes acts of minor misconduct that require formal disciplinary action. Examples include tardiness; poor attendance; and unsatisfactory work performance. Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. Examples include failure to follow supervisor's instructions; leaving work without permission; and failure to report to work without proper notice/approval. Group III category of offenses includes acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; indicate significant neglect of duty; result in disruption of the workplace; or other serious violations of policies, procedures, or laws. Absent mitigating circumstances, job termination is the normal result of a Group III level offense.

The Offense

The Group III Written Notice, issued by the agency's senior buyer on August 28, 2023, detailed the facts of the offense, and concluded:

> Initially, [the Grievant] was given permission to approve requisitions over $100,000.00, only if they were a mandatory source or on contract. However, [the Grievant] received an email on 8/8/2023 stating not to approve any requisitions over $10,000.00. [The Grievant] did not adhere to the established policies and procedures and she approved the following:

- 8/7/2023 - approved REQ934899 Capital Outlay/ABM for $7,439,173.75, a department that she was not responsible for, and did not contact the Senior Buyer to inquire about this procurement. This raises great concern considering the high dollar value of the requisition. The requisition was approved, however, there was no proposal or quote attached. The end user was asked to withdraw the requisition and attach the proper documentation.
- 8/7/2023 -·approved REQ928227 Student Success for $18,602.86. a department that she was not responsible for, and did not contact the Buyer to inquire about this procurement. This requisition was over $10,000.00, not on contract, nor a mandatory source, which meant the order should have gone out on Quick Quote. Ultimately, the PO had to be cancelled so that it could be procured properly through an Unsealed Biddjng process.
- 8/7/2023 -·approved REQ934636 Capital Outlay for $87,657.00, a department that she was not responsible for, and did not contact the Senior Buyer to inquire about this procurement. This order was on contract.
- 8/8/2023 -·approved REQ930776 Finance for $8,818,104.40, a department that she was not responsible for, and did not contact the Buyer to inquire about this procurement. This order was on contract; however, it still raises great concern considering the high dollar value.
- 8/10/2023 - approved REQ945492 for $18,235.00, even after receiving a directive not to approve any orders over $10,000.00. This was your assigned department.

This discipline is warranted due to [the Grievant's] unsatisfactory work performance and a failure to follow directions. These detrimental errors could have potentially placed the University at great risk, up to and including fines and litigation.

Agency Exh.6. As circumstances considered, the Written Notice included:

The attached statement from [the Grievant] was considered. [The Grievant] indicates that this was an extreme clerical error. This was not just one clerical error, but multiple critical errors that should not have been submitted by a trained, certified procurement professional. [The Grievant] received her Virginia Contracting Associate (VCA) Certification in May 2023. Additionally, [the Grievant] attended an extensive 3·part training created for the Liaisons and passed the final assessment with a score of 90.

Subsequently, yesterday after the due process meeting, the Interim Director discovered another REQ956264 in the amount of $39,145.60 that [the Grievant] approved. This further supports [the Grievant's] unsatisfactory work performance and failure to follow instructions.

Every transaction submitted by the Liaisons cannot be monitored; however, management needs to be confident in the Liaisons' decisions. The supervisor and Interim Director are always available to assist with any challenges. Although

> properly trained and certified, [the Grievant] continues to make unfavorable decisions that can severely impact the agency. According to DHRM Policy 1 60, Standards of Conduct, repeat infractions of the same or significantly similar offense may be considered an aggravating factor.

Agency Exh. 6.

The attached statement referred to in the circumstances considered, noted above, was the Grievant's written response to the due process memorandum. The Grievant wrote:

> I take full responsibility for the six occurrences that were addressed in the memorandum. However, please understand that all the occurrences outlined that have extremely high dollar amounts [$7,439,173.75; $87,657.00; $8,818,104.4] were approved in error. **Extreme clerical error.** My inability and negligence to pay attention to the detail not only of the amount, but in some cases, the accuracy of the documents is no one's fault [but] my own.

(Emphasis in original.) Agency Exh. 4. In the same response, the Grievant also wrote:

> However, I would like to say the lack of training and understanding of different policies and procedures and the "gray area" that is a constant in the field of Procurement did play a part in some of the incidents outlined in this memorandum.

Agency Exh. 4.

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

The agency's interim procurement director testified that the Grievant took the training and obtained the eVA system Virginia Contracting Associate (VCA) certification on May 18, 2023, Agency Exh. 16, within a couple of months after her hiring in March 2023. In addition, the interim procurement director provided training to the Grievant and other procurement liaisons. Agency Exh. 13. The interim procurement director recalled that her training was over three days, but the Grievant and other witnesses stated it was one day. The interim procurement director testified that she stated multiple times during her training that the liaisons would have approval authority up to $10,000, and that threshold never increased.

The interim procurement director, on May 21, 2023, sent an email to the Grievant that stated, among other things, "Please continue to work on requisitions under $10,000 in the inbox and update the report as you work on them." Agency Exh. 17. This was just a few days after the Grievant's successful VCA certification. On June 23, 2023, the Grievant wrote in an email to a procurement user, "If you send me the requisition numbers, I will be more than happy to review and approve. However, if they are over $10,000, my permissions will not allow me to approve them. Liaisons are limited to that dollar threshold. Only Contract Officers and Senior Contract Officers have the authority to approve larger amounts." Agency Exh. 18.

The interim procurement director testified that the agency did not have any leeway in the discipline because the Grievant could no longer be trusted to follow the agency instruction that limited her requisition approval authority. The Grievant's position was an entry level position, so demotion was not an option.

On cross-examination, the interim procurement director conceded that the Grievant's employee work profile (EWP) contained a $100,000 approval threshold. The interim procurement director testified that it was an incorrect amount for the Grievant and she had not noticed the error. The Written Notice itself references the $100,000 authority if the requisition is a mandatory source or on contract. The interim procurement director testified that this information is incorrect, and the Grievant was directed multiple times regarding her $10,000 requisition approval limit. The Grievant was not provided a formal 30-, 60- or 90-day interim evaluation.

The procurement director who hired the Grievant testified that the Grievant had a $10,000 requisition approval limit, and the reference in the EWP was a "typo." Training of the Grievant reinforced the $10,000 approval limit. As emphasis, he testified that he, as the procurement director, only had authority up to $50,000. The EWP was developed "from scratch," and he did not notice the $100,000 figure and did not see or review the Written Notice. Interim evaluations are not required.

The senior buyer testified that she issued the Written Notice, and she has 34 years of procurement experience. She confirmed the document "Liaisons Role and Responsibilities." Grievant's Exh. 7. In this document, provided to the liaisons in August 2023, there is reference to the role limited to small purchases under $10,000 and "Over $10,001 Forward to Buyer." This is consistent with other evidence described above. The senior buyer testified that making clerical errors in approving requisitions is not likely because one has to hit the green button twice to effect approval. The senior buyer went through the offending transactions listed in the Written Notice and testified consistently with them. The senior buyer testified that she, like the procurement director, has only up to $50,000 in approval authority. On cross-examination, the senior buyer stated that she specifically directed the Grievant not to go over $10,000 regardless of contract or mandatory source. On August 8, 2023, the senior buyer sent the Grievant an email stating, "Please be advised do not approve/process any orders over $10,000." Agency Exh. 21. On August 10, 2023, the Grievant approved yet another requisition over $10,000.

The Grievant testified that she was hired March 27, 2023, as one of six procurement liaisons. The EWP was not provided to her until May 23, 2023. Grievant's Exh. 6. The Grievant was not told that the $100,000 figure in the EWP was an error. The Grievant testified that the VCA certification itself permits a $100,000 approval. The Grievant testified that her authority was initially $10,000, before she received her EWP and obtained VCA certification. The Grievant testified that she did not consider the EWP to have a typo. The Grievant also testified that the senior buyer told the Grievant that after VCA certification, the Grievant's approval authority was up to $100,000 as long as a mandatory source or on contract. The Grievant testified that she did not read the senior buyer's August 8, 2023, email until August 9, 2023. The Grievant testified that she did not have an adequate opportunity during the due

process meeting to explain—she was only allowed to submit her written rebuttal, which she did. Agency Exh. 4. The Grievant concedes that she approved all the transactions listed in the Written Notice, but that her only mistake was the singular approval listed as the second bullet on the Written Notice. On cross-examination, the Grievant insisted that the senor buyer told her that her authority increased after her VCA certification, despite the May 21, 2023, email reaffirming the $10,000 approval limit. Agency Exh. 17. The Grievant never questioned anyone about the apparent discrepancy in her approval authority. The Grievant testified that she felt coerced to write her rebuttal to the due process memorandum and take responsibility, although the language used was entirely the Grievant's.

Testifying for the Grievant, a capital/facility procurement officer testified that the procurement director stated that approval authority increases after VCA certification. The procurement officer testified that she had no personal knowledge of requisitions.

A former procurement liaison, CS, testified that the training was not extensive, and the procurement director's training was only one day. She testified that her understanding was that approval authority was $10,000 until VCA certification.

Another former procurement liaison, TW, testified that, although information was sporadic, the initial $10,000 authority would increase after VCA certification.

Another former procurement liaison, TV, testified that, according to the procurement director, after VCA certification, approval authority was over $100,000 if for a mandatory source or contract.

The procurement director testified, in rebuttal, that she lacked authority to grant the liaisons approval authority over $10,000. The agency's vice president of finance and finance director would have to make any such changes. The procurement director denied she ever provided verbal statement for such increased approval authority, and that for such approval eVA personnel would have to change the profile for affected employees.

Analysis

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

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the agency has reasonably proved the misconduct of the Group III Written Notice.

By a preponderance of the evidence, the agency has proved the conduct described in the Written Notice, and that the misconduct satisfies the level of repeated, serious violations of instruction, policies, and procedures. The Grievant's testimony essentially corroborates the essential facts of the offense, as she conceded she made the approvals detailed in the Written Notice, all in excess of the $10,000 approval authority. The Grievant asserts the applicability of $100,000 authority that inconsistently appears in the record. The agency's sloppy use of the $100,000 figure, even included in the Written Notice itself, certainly creates at least an ambiguity; however, there is specific, direct corroboration of the $10,000 requisition approval authority for procurement liaisons, regardless of VCA certification. The Grievant never raised to her supervisors a question of clarity regarding the limit of her authority. Against any ambiguity of the Grievant's authority, there is the Grievant's unequivocal expression of her understanding of this $10,000 limit, notably expressed in her June 23, 2023, email to a procurement user. Agency Exh. 18. Additionally, in her email to the interim director of procurement, June 13, 2023, seeking a compensation increase, the Grievant described her job as "an entry level buyer's role by approving requisitions under $10,000 …" Agency Exh. 16. The Grievant's own statement, written during her due process, confirms the Grievant's ownership of her errors.

Agency Exh. 4. Although written to temper the agency's disciplinary response, the words were solely the Grievant's. The agency somehow made unclear impressions of the liaisons' authority, as evidenced by the EWP and liaisons' testimony. However, the agency's oral and written directives that establish and corroborate the Grievant's $10,000 threshold credibly overcome any ambiguity of the $100,000 figure, regardless of whether it is a typo in the EWP. (This error was mistakenly repeated in the written notice, but the Grievant may not rely on this error of the written notice for her prior actions.)

The Grievant has not asserted that the discipline is directed to her for a discriminatory or retaliatory reason, or that her discipline is disparate treatment of other similarly situated employees. The Grievant points out that she was not provided more progressive discipline and submits her violations merit more lenient punishment under the circumstances. These assertions may be reasonable, but they are beyond my reach in this matter. As EDR has held:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling Number 2014-3873 (May 14, 2014).

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

Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules,* § VI.B.1.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.,* EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that the repeated violation was appropriately a Group III. While agencies are encouraged to follow progressive discipline, an agency is not required to do so within its discretionary management. The Grievant's final requisition approval in excess of authority on August 27, 2023, was viewed appropriately as an aggravating factor.

Given the nature of the Written Notice, as decided above, I find no evidence or circumstance that allows the hearing officer to reduce the discipline. The agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of a Group III Written Notice must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

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

The Grievant did not have a long tenure with the agency. Regardless, under the *Rules*, an employee's length of service and otherwise satisfactory work performance, standing alone, are not sufficient for a hearing officer to mitigate disciplinary action. *Thus, the hearing officer lacks authority to reduce the discipline on these bases.* On the issue of mitigation, the Grievant bears the burden of proof, and she lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

Under the EDR's Hearing *Rules*, the hearing officer must give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the extent of the disciplinary action. In light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice, with job termination, must be and is upheld.

APPEAL RIGHTS

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

Please address your request to:

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

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

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

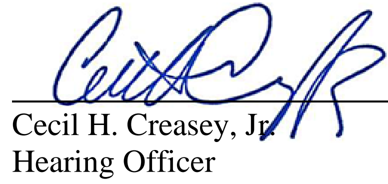
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[2]

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

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

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer