COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11583

Hearing Date: November 4, 2020
Decision Issued: November 20, 2020

PROCEDURAL HISTORY

On April 29, 2020, the Grievant was issued a Group I Written Notice for:

> On March 5, 2020, you were issued a counseling memorandum to address your performance issues concerning you [sic] lack of responsiveness to emails, processing rravel [sic] reimbursements, and you [sic] lack of attention to detail. Unfortunately, your performance issues continued to be unsatisfactory. In recent weeks, you have submitted numerous vouchers, requisitions and receiving report that have contained errors. You have failed to follow my instructions and directives to submit documentation by the requested deadlines, scan and key vouchers promptly and provide requested information to DJJ staff. Furthermore, you have not checked emails in a timely manner or properly responded to email requests, which has caused you to miss deadlines or delay in taking action. Your performance issues violate DHRM Policy 1.60 Standards of Conduct. Perform assigned duties and responsibilities with highest degree of public trust: Devot [sic] full effort to job responsibilities during work hours; and meet or exceed established job performance expectations. [1]

On May 29, 2020, the Grievant timely filed a grievance challenging the Agency's actions. [2] On September 4, 2020, the grievance was assigned to a Hearing Officer. A hearing was held on November 4, 2020.

APPEARANCES

Agency Counsel
Grievant
Grievant Representative
Witnesses

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[1] Agency Exhibit 1, Tab 1, Page 1

[2] Agency Exhibit 1, Tab 2, Page 101

ISSUES

Did the Grievant violate DHRM Policy 1.60, *Standards of Conduct*, by
- failing to perform assigned duties and responsibilities;
- failing to devote full effort to job responsibilities during work hours; and,
- failing to meet established job performance expectations?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [3] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [4] However, proof must go beyond

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[3] *See* Va. Code § 2.2-3004(B)

[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

conjecture. [5] In other words, there must be more than a possibility or a mere speculation. [6]

FINDINGS OF FACT

After reviewing the evidence presented, I make the following findings of fact:

The Agency provided me with a notebook containing seven tabs, and that notebook was accepted in its entirety as Agency Exhibit 1, without objection, with the exception of the first four pages of Tab 6. Objection was made to these documents, and I withheld my decision to that objection until and unless those pages became relevant in the course of testimony during the hearing. Inasmuch as they were not relevant to any of the testimony of any of the witnesses, I overruled the objection. Those pages were not used in any manner or consideration in this Decision.

The Grievant submitted a notebook containing five tabs, only four of which had documentation, and that notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

On March 5, 2020, the Agency delivered to the Grievant a Counseling Memorandum. [7] In that Counseling Memorandum, the Agency indicated that emails were not being responded to by the Grievant in a timely fashion; Tuition reimbursements were not being addressed in a timely fashion; and travel reimbursements were not being addressed in a timely fashion. Timely fashion was defined as - 24-hours from receipt. Various other issues were addressed in this Memorandum and the Grievant's supervisor stated in that Memorandum:

> Please let me know if there is anything I can do to assist you in any way or if you are unable to meet these expectations at any time. [8]

The testimony presented to me was that, prior to the year 2020, the Grievant was a valued employee. The Grievant testified that, in the time period just prior to the Counseling Memorandum, she experienced a change in certain prescription medication that she was taking. The Grievant's immediate supervisor testified that, sometime during the first part of March, 2020, she became aware that the Grievant took prescribed medication and that there had been a change in the medication. The supervisor suggested the Greivant utilize the services provided by EAP. The Grievant indicated she was already using EAP. It is certainly possible that a medication change was the cause of the issues that led up to the issuance of the Counseling Memo on March 5, 2020. Unfortunately, the Grievant testified that she did not pursue the issue of the medication change and how it was impacting her work performance as she simply did not want others to know these issues about her personal life. The supervisor of the Grievant's

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[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

[7] Agency Exhibit 1, Tab 5, Pages 1 and 2

[8] Agency Exhibit 1, Tab 5, Page 2

immediate supervisor testified before me. She was the second step respondent in this matter and her testimony was that the medication issue first came up and the Agency became aware of this issue at the second step reconsideration. At that point, the second step respondent offered the possibility of ADA accommodations to the Grievant and the Grievant testified that she and her doctor did not think that such accommodations were necessary.

A second matter of complication regarding the Grievant's work performance was that on March 23, 2020, the Grievant began telecommuting. That telecommuting would end on April 6, 2020. [9]

The second step respondent, in her testimony before me, quite succinctly stated that the Grievant's lack of responsiveness to emails was the issue that triggered the issuance of the Counseling Memo and the Written Notice.

The Counseling Memo sets forth many issues. Many of which are issues dealing with timeliness and responsiveness to emails. [10] However, there were other issues regarding accuracy. The Agency introduced numerous receipts which indicated that the receiving date for equipment, was mis-coded. [11] The Agency introduced an email dated March 7, 2020, which was written by the Grievant and directed to an Agency employee regarding educational assistance. The Grievant indicated that she would respond within three business days, and in fact did not respond for nine business days. [12]

On March 26, 2020, the Grievant's immediate supervisor sent her an email setting forth in bullet-points, issues that had arisen regarding lack of responsiveness to incoming emails.

While it is certainly likely that working from home was more difficult than working from an office, the Grievant's supervisor testified that the Grievant told her that the Grievant had no problems or issues with teleworking. Indeed, on March 26, 2020, in response to an email from her supervisor, the Grievant stated, "No issues teleworking." [13]

One of the issues with teleworking was the actual lack of office equipment at the Grievant's home. On March 23, 2020, the Grievant wrote to her supervisor indicating that everything would be business as usual with a few exceptions. One of those exceptions was the fact that she was working with only one monitor. [14] On March 24, 2020, the supervisor wrote to the Grievant setting forth a contemplated timeline of how a teleworking day should work and stated in that email as follows:

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[9] Agency Exhibit 1, Tab 7, Page 21

[10] Agency Exhibit 1, Tab 5, Pages 1 and 2

[11] Agency Exhibit 1, Tab 6 , Page 29-36

[12] Agency Exhibit 1, Tab 6, Page 93

[13] Agency Exhibit 1,Tab 2, Page 7

[14] Agency Exhibit 1, Tab 2, Page 48

> If you are continuing to have concerns with the daily work plan, 100% digital documents, and working with only one monitor, please let me know. I will be happy to schedule a meeting with HR to see what our other options are. [15]

The supervisor testified that her offer to speak with HR was not responded to by the Grievant.

The Grievant testified before me and stated that teleworking was extremely difficult. In her testimony, she mentioned the fact that she was working at home with only one monitor and that during the teleworking period, her printer stopped working. However, the Grievant was very clear in her testimony that she did not tell anyone at the Agency that she was struggling for lack of a monitor or lack of a printer. Indeed, the evidence presented before me by the Agency, and the Grievant and documentary evidence, was that the Grievant did not notify the Agency of her problems. In fact, she testified directly that she did not do this because she did not think there was anything that could be done.

This is a matter that in all likelihood would not have occurred but for a confluence of a change in medication and the need to work from home caused by COVID-19. The Greivant was a valued employee prior to these two events. When the two combined, coupled with the Grievant's inability to advocate for herself regarding the need for better equipment to work at her home and her desire to keep certain medical issues private, the quality of the Greivant's work product declined and the Agency issued the Written Notice. While I might have pursued a different course, based on the evidence before me, the actions taken by the Agency were reasonable.

In considering the totality of the evidence, both documentary and in testimony of witnesses, I find that the Agency has bourne its burden regarding the Grievant's failure to perform assigned duties and responsibilities and failure to meet job performance expectations. I do not find that the Agency has bourne its burden regarding the allegation that the Grievant failed to devote full efforts to job responsibilities during work hours.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("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 the agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

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[15] Agency Exhibit 1, Tab 2, Pages 52 and 53

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitutes misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether or not the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

DECISION

For reasons stated herein, I find that the Agency has bourne its burden of proof in this matter and that the issuance of the Group I Written Notice was proper.

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.[1]

[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].

William S. Davidson
Hearing Officer

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