

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11567**

Hearing Date: September 30, 2020

Decision Issued: October 9, 2020

PROCEDURAL HISTORY

On April 21, 2020, Grievant received a Group II Written Notice for violations numbered one through nine, with violation number six being subsequently resolved and not to be considered at hearing. Each of the alleged violations was a violation of either Policy 1.60- Standards of Conduct described as “failure to follow instructions and/or Policy, and insubordination” or violation of Policy 2.35 Civility in the Workplace described as “demonstrating behavior that is rude, inappropriate, discourteous, unprofessional; raising ones voice inappropriately or shouting at another person.”

Grievant timely filed Grievance Form A to challenge the Agency’s action. The Hearing Officer in this matter upon being appointed effective July 13, 2020, conducted a pre-hearing telephone conference on July 21, 2020 with the Grievant’s Attorney and the Agency Advocate. It was agreed that the hearing would be conducted on September 1, 2020. Due to a medical emergency experienced by the Grievant’s Attorney, the Hearing Officer, over the objection of the Agency Advocate, agreed to reschedule the hearing. The Grievant’s Attorney and the Agency Advocate agreed that the date for the rescheduled hearing would be September 30, 2020

APPEARANCES

Grievant
Grievant’s Attorney

Agency Party Designee
Agency’s Advocate

ISSUES

1. Whether Grievant acted or failed to act as alleged in each of the alleged violations numbered 1, 2, 3, 4, 5, 7, 8 and 9?
2. For each instance, if any, that the Grievant did act or failed to act as alleged, was such behavior a violation of Agency Policy as alleged?
3. Whether the Agency's issuance of a Group II Written Notice was consistent with law and Policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of any disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual (GPM) section 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Grievance
2. Group II Written Notice
3. Standards of Conduct
4. Civility in the workplace
5. (Agency) Vision & Culture
6. Statement on equity/workplace expectations
7. (Agency) Code of Ethics
8. Job Description (EWP)
9. Organizational Chart
10. March 2, 2020 Memorandum/Verbal Counseling
11. Written Notice supporting documentation #1
12. Written Notice supporting documentation #2
13. Written Notice supporting documentation #3
14. Written Notice supporting documentation #5
15. Written Notice supporting documentation #7
16. Written Notice supporting documentation #8
17. Written Notice supporting documentation #9

18. (Supervisor's) Notes
19. Additional supporting documentation
20. Letter of expectations December, 2017

The Grievant Exhibits admitted into evidence are contained in two notebooks with no table of contents and numbered 1 to 10.

FINDINGS OF FACT

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

The Agency employed Grievant as the Grounds Shop Supervisor. In that capacity, the Grievant was responsible for supervising up to thirteen employees and maintaining the grounds and other duties assigned to the Grievant's shop. The Grievant's direct supervisor was the Director of Maintenance & Operations, who in turn answered to the Director of Physical Plant.

The Agency's first witness was the Director of Physical Plant. The witness testified that it was extremely important that the "grounds" be well attended at all times in light of the nature and mission of the Agency. The witness took over as the Director of Physical Plant in June 2019 and met with the Grievant to discuss morale issues and a shop safety training luncheon. Referring to notes set out at Agency Exhibit 18, the witness described various interactions with the Grievant from June 2019 until the issuance of the Group II Written Notice on April 21, 2020.

The witness supported each of the numbered violations as follows:

- Violation 1. On March 5 and March 6, the Grievant failed to stop by the Supervisor's office as previously instructed. The witness referred to Agency Exhibit 11 which included an email sent to the Grievant by the Grievant's Supervisor on February 24, 2020 directing the Grievant to resume stopping by the supervisor's office in the morning in case the supervisor has any items that need to be addressed. The supervisor then set out that the Grievant failed to stop by the office on February 26, March 5 and March 6.
- Violation 2. The Grievant's Supervisor instructed the Grievant to email a picture to the supervisor regarding some damage which needed to be repaired. The Grievant did not send the picture to the supervisor, but instead sent a work order directing another team to repair the damage. The witness referred to Agency Exhibit 12 which included an email from Grievant's Supervisor to the Director of Physical Plant setting out that the Grievant had not sent pictures as requested and directed another shop to do repairs. The Grievant's Supervisor set out in the email that the Grievant's attitude was borderline hostile and that the Grievant did not seem to have respect for anyone.

- Violation 3. The witness testified that the grounds crew were considered essential employees during the pandemic. On March 20, 2020 at 10:59 a.m. the Grievant submitted the support mowing plan for the corona virus shut down. At 3:00 p.m., the Grievant called the witness stating that the Grievant's grounds team had concerns about working. The Director of Physical Plant and the Assistant Director of Physical Plant met with the Grievant and the Grievant's team and agreed that the Grievant's team would think about it over the weekend and report back to the witness on Monday, March 23, 2020 with the team plan. Only after the witness emailed and sent text messages to the Grievant after 4:00 p.m. (the close of the workday) did the Grievant call and respond that no one on the Grievant's entire grounds team, including the Grievant, were willing to work. The witness testified that during the conversation the Grievant "ranted, raised his voice and was disrespectful."
- Violation 4. On Wednesday, March 25, 2020 the witness instructed the Grievant to report for a meeting at 1:00 p.m. to review the mowing plan. Present at the meeting were the witness (Director of Physical Plant), the Deputy Director of Physical Plant, the Director of Maintenance and Operations (the Grievant's Supervisor) and the Grievant. During the meeting all in attendance witnessed the Grievant raising his voice several times, in a rude, inappropriate, discourteous, and unprofessional manner.
- Violation 5. On April 1, 2020, the Grievant sent an email to the witness as Director of Physical Plant stating that the Grievant had talked with other supervisors about the emergency leave time and stated that the Grievant thought there should be a meeting to review the special leave time and the consequences of using up the 160 hours of leave. The witness noted that the email was not sent to the Grievant's supervisor but to the Director with copies of the email sent to the Grievant's supervisor as well as other supervisors. In response to the Director of Physical Plant advising "There will be no meeting. If you have questions, please call me to discuss.", the Grievant sent a second email to the Director of Physical Plant, again copying his supervisor as well as other supervisors stating "If NO ONE else sees value in us all being on the same page and fully understanding this leave time, so be it". The Director of Physical Plant considered the Grievant's email to be very unprofessional and disrespectful.
- Violation 7. On April 8, the Grievant sent an email to the Director of Physical Plant reminding about the Grievant's request for masks. The Director of Physical Plant informed the Grievant via email to pick up the masks the next morning, April 9, and to stop by the Director of Physical Plant's office. The Grievant did neither. The witness referred to Agency Exhibit 15, a series of emails and a photograph, in support of this charge.
- Violation 8. On April 8, the Grievant again failed, as previously instructed, to include the Grievant's supervisor in the Grievant's email replies. The witness referred to Agency Exhibit 16 which included an email from the Grievant dated March 26,

2020 directed to the Director of Physical Plant, with a copy to the Deputy Director of Physical Plant, but without a copy to the Grievant's supervisor. The Director of Physical Plant then advised the Grievant by email that Grievant needed to copy the Grievant's supervisor on the emails. The Grievant did respond by email that the Grievant thought all parties had been included. Exhibit 16 also included a copy of an email dated April 7, 2020 from the Director of Physical Plant to the Grievant and the Grievant's supervisor advising "Please review and let me know if this is what we want." The Grievant then on April 8, 2020 responded to the Director of Physical Plant's email without copying the Grievant's supervisor. In response, the Director of Physical Plant again reminded the Grievant to copy the Grievant's supervisor.

Violation 9. On April 9 the Grievant's supervisor sent an email to the Grievant regarding methods and frequency of communication during the Covid-19 alternative work schedule. In response the Grievant sent the email set out at Agency Exhibit 17 to his supervisor with copies to the Director of Physical Plant and the Deputy Director of Physical Plant. The content and tone of the Grievant's email was considered a challenge to the instructions given to the Grievant by the Grievant's supervisor.

The witness testified that by combining all of the violations under a single Group II Written Notice, without suspension or other discipline, this was mitigating what could have been multiple Group II Written Notices with suspension or termination. The witness testified that the hope was to get the Grievant's attention and improve the Grievant's attitude.

The Agency's second witness, the Grievant's supervisor, testified that he had been the Director of Maintenance and operations since January of 2010 with the Grievant beginning to report to him in February of 2015. The witness referred to Agency Exhibit 20 a letter of counseling the Grievant received December 4, 2017; confirmed that he instructed the Grievant to stop by every morning but that the Grievant did not on March 5 and 6; that the Grievant did not send him the photograph as instructed and that if he had he would have required the Grievant's team to make the repair, not send out a special work order; confirmed that the Grievant was unprofessional at the meeting and pounded the table (violation 4). During cross examination the witness indicated that the grounds crew had been shorthanded since January.

The Agency's third witness, the Deputy Director of Physical Plant testified that he began to be concerned with the Grievant's conduct in March 2020, conduct which he considered to be "disrespectful." He testified that he absolutely agreed that the Grievant was rude and disrespectful in the meeting; that the Grievant's voice and body language were very aggressive; constantly and consistently challenging (the Director of Physical of Plant)"; that the Grievant told the group that the Grievant's supervisor lies; and that the Grievant spent most of his time complaining about complaints the Grievant had from the past. The witness also testified that the email sent to the witness by the Grievant (Agency Exhibit 17) is insubordination and that the

Grievant's email to the Director of Physical Plant (Agency Exhibit 14) undermines the Director of Physical Plant's authority. The witness further testified that he believes that the Grievant's behavior is "purposeful behavior." During cross examination, the witness testified that even though the Grievant emailed him on March 23, 2020 at 11:13 a.m. that "Nobody in the grounds shop volunteered to work," the witness did not recall getting the email because "a lot was going on." The witness did not notify the Director of Physical Plant on March 23, 2020 that he had heard from the Grievant and that the crew had elected not to work.

The Agency's fourth and final witness, the Deputy Superintendent, testified as to the Agency's mission (Agency Exhibit 5) and the expectations as to the ground's appearance in line with the mission. The witness testified that a lot of trust was placed in the Grievant. The witness testified that it was very frustrating to deal with the Grievant's behavior considering the pandemic uncertainty.

The Grievant called as his first witness the person who formerly held the position of Post Engineer and had hired the Grievant as a "lead worker." While the witness testified that he had no "negatives" on the Grievant, his primary observation was that from being on the post daily from 2015 up until April 2020, the grounds appeared to be in very good condition.

The Grievant's second witness worked in the warehouse and physical plant and did not offer testimony which shed light on the proceedings.

The Agency's third witness was foreman of the grounds shop with the Grievant being his supervisor. He testified that the Grievant is very meticulous and always "stepped up...and got things done." He testified that he never observed the Grievant be aggressive, yell or otherwise behave in an inappropriate manner. He testified that Grievant is dedicated to the grounds and looks out for his crew.

The Grievant's next witness was a crew leader supervised by the Grievant who described the work of the grounds crew as a combination of mowing, irrigation, plumbing and moving. He described the Grievant as being "calm, cool and collected." During cross examination the witness stated that "we" think that the Grievant is being retaliated against.

The Grievant's next witness is a grounds keeper supervised by the Grievant. The witness described the Grievant as an excellent supervisor with a loyal crew. He complained about having to do other things which take away from the need to tend to the grounds.

The Grievant's next witness was a lead man on the grounds crew supervised by the Grievant. He confirmed the comments of the other witnesses supervised by the Grievant.

The Grievant's wife also testified specifically as to the March 20, 2020 telephone conversation that the Grievant had with the Director of Physical Plant. The witness testified that

it sounded like they were having a civil conversation with nobody yelling or being inappropriate.

Finally the Grievant testified that he has been with the Agency since 2007. He testified that he should have fourteen fulltime employees but is now at ten. He testified that among other complaints that he had he was particularly offended by his crew not getting overtime work which was available in January 2019 especially when he was told that “your people are not presentable.” He testified that he strongly objected to that statement and was offended by it.

The Grievant reviewed the fact that he had received “extraordinary contributor” rating every year and that his complaints were legitimate. He stated that his supervisor had favorites, denied that he pounded or slammed his hands on the table during the meeting; denied that he said “I wasn’t the only one to slam the table”; and that when asked by his supervisor “Do you respect me?” he did say “No, because you do not put (the Agency) first”.

The Grievant testified that on March 5 he was getting in his truck when his supervisor came out at which time the Grievant showed the supervisor the photo. The Grievant testified that at that point he had already talked to the other plant about the work order. The Grievant denied that his supervisor told him to send him the photo. The Grievant testified that he did not think he did anything wrong on March 5 and that he didn’t stop March 6 because he “wanted to get to work.”

The Grievant testified as to his failure to copy his supervisor, that he did not intend to leave his supervisor out of the loop. He testified that he is not great with the computer and didn’t understand “reply all” process.

The Grievant testified that as to violation 5 regarding the email to the Director of Physical Plant with copies to the other supervisors that he was concerned that communication was poor so he sent the email to “get us on the same page.”

As to the issue regarding not picking up the masks, the Grievant testified that he was not on the clock and had his seven year old son with him, that he didn’t see the masks and that the Director of Physical Plant said hello, he said hello in reply and that nothing else was said.

The Grievant repeated that regarding Agency Exhibit 16 “I never intentionally left (my supervisor) off”. He testified that he is not computer savvy, that he did not mean to be insubordinate and that he just hit reply. As to Agency Exhibit 17, the Grievant testified that he did not intend to disparage his supervisor by his email and that even though his is “not computer savvy” he did cut and paste a portion of the email. The Grievant did admit that item number three in the Grievant’s email at Exhibit 17 “doesn’t sound good.” Finally, the Grievant testified with respect to Agency Exhibit 14 that even though the Director of Physical Plant instructed the Grievant “There will be no meeting. If you have questions please call me to discuss.”, “I didn’t call because she was giving incorrect information.”

Agency Exhibit 3, Standards of Conduct Policy: 1.60 sets out that a Group II offense is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. The penalties for a Group II Written Notice can be suspension of up to ten work days for the first Group II offense with a second Group II normally resulting in termination.

Agency Exhibit 4, Civility in the Work Place, Policy 2.35, page 8 lists under prohibited conduct/behaviors “demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest”. Finally, Agency Exhibit 5 sets out the statement of (Agency) Mission & Culture which states “as a (Agency) employee, you contribute to this mission every day. (The Agency) expects a culture of true civility and mutual respect among its employees. (See also Agency Exhibit 7, Code of Ethics).

CONCLUSIONS

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Agency’s evidence, even in light of the Grievant’s testimony and assertions contained in Grievance Form A, establishes by a preponderance of the evidence that the Grievant was guilty of Violation 1., Failure to follow instructions, when he did not stop by his supervisor’s office as instructed; Violation 3. Civility in the work place, by demonstrating rude, inappropriate, discourteous or unprofessional conduct regarding the telephone conversation with the Director of Physical Plant on March 23, 2020; Violation 4. Civility in the work place by demonstrating behavior that is rude, inappropriate, discourteous or unprofessional at the meeting conducted on March 25, 2020; Violation 5. Civility in the work place -disruptive

behavior by the content and distribution of the Grievant's emails on April 1, 2020; Violation 8. Failure to follow instructions when repeatedly failing to include his supervisor on emails; and Violation 9. Failure to follow instructions by challenging his supervisor's instructions of April 9.

The Agency did not carry the burden of proof as to Violations 2 and 7.

Virginia Code Section 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resources Management ...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees and (3) the disciplinary action was free of improper motive.

In light of the standards set forth in Rules, the Hearing Officer finds no additional mitigating circumstances which exist to further reduce the disciplinary action imposed by the Agency.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group II Written Notice is upheld.

APPEAL RIGHTS

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

Please address your request to:

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

or, send by e-mail to, or by fax to (804) 786-1606.

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

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

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

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

ENTERED: 10/9/2020
Date



John R. Hooe, III
Hearing Officer

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