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. 11670; 11671

Hearing Date: May 26, 2021
Decision Issued: June 7, 2021

PROCEDURAL HISTORY

Grievant was a unit manager for the Department of Corrections ("the Agency"). The two grievances at issue are: 1) a December 20, 2020, expedited grievance challenging the agency's issuance of a Group III Written Notice with a disciplinary demotion, pay reduction, and transfer for alleged unsatisfactory performance, failure to follow instructions and/or policy, obscene or abusive language, disruptive behavior, violation of DHRM Policy 2.35, *Civility in the Workplace*, threats or coercion, and other specified misconduct (Case Number 11670), and 2) a second December 20, 2020, expedited grievance challenging the agency's issuance of a Group II Written Notice, also with a disciplinary demotion, pay reduction, and transfer, for the same or similar types of misconduct identified on the Group III Written Notice (Case Number 11671).

The Grievant timely filed a grievance to challenge the Agency's disciplinary actions, and the grievances qualified for a hearing. The Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") found that consolidation of the two grievances was appropriate.

On March 4, 2021, EDR appointed the Hearing Officer for these consolidated grievances. During the pre-hearing conference, the grievance hearing was scheduled for May 26, 2021, on which date the grievance hearing was held, via remote video. The Grievant initially had an advocate, but he elected to proceed at the grievance hearing without one.

Both the Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence presented.[1]

1 The Grievant complained of pre-hearing violations by the Agency, regarding production of requested documents and timely exchange of exhibits. Post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine adverse witnesses in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel. EDR Ruling Number 2021-5238 (May 12, 2021). At the hearing, when asked what prejudice he alleged and what procedural

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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

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relief he was seeking, the Grievant expressed he was prepared to go forward with the hearing. This grievance process has provided these due process safeguards. Both sides submitted exhibits for the record post-hearing that are not considered for this decision.

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."

The Offenses

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 employed the Grievant as a unit manager, with no prior active Written Notices. The Group III Written Notice provided:

Offenses include violations of Operating Procedures (OP) 135.1, *Standards of Conduct*, OP 145.3, *Equal Employment Opportunity, Anti-harassment, and Workplace Civility*, OP 135.3, *Standards of Ethics and Conflict of Interest*, DHRM Policy 2.35, *Workplace Civility*, for the following:

- workplace harassment, hostile work environment, and bullying;
- failure to create or maintain a culture that fosters the Healing Environment;
- failure to treat coworkers, supervisors, managers, subordinates, offenders, and other stakeholders with respect, courtesy, dignity, and professionalism;
- failure to be open to communication and collaboration with colleagues in a manner that generates trust and teamwork;
- abuse of your authority, as a Unit Manager, and influence over others;
- conduct and interpersonal interactions with coworkers (e.g., tone of voice or manner you conduct yourself during a discussion) that are not in keeping with the Healing Environment and your obligation to work cooperatively and resolve work-related issues and disputes in a professional and constructive manner; and
- intimidating, inappropriate, uncivil, disruptive, unprofessional, and hostile conduct.

A good organizational culture is vital to promoting a healthy, productive workplace. Toxic behaviors, such as those you engaged in (as noted above), negatively impact staff morale, performance and turnover. Given your role and authority as a Unit Manager, you have a heightened responsibility to role model professional, respectful, and civil behavior, aligned with the Healing Environment.

The Healing Environment is a cornerstone of our agency's culture and "is purposefully created by the way we work together and treat each other, encouraging all to use their initiative to make positive, progressive changes to improve lives. It is safe, respectful, and ethical, where people are both supported and challenged to be accountable for their actions." Every employee, as noted in procedure and Employee Work Profiles, is responsible for creating and maintaining a Healing Environment through their treatment of others and by being accountable for their actions.

However, your role as a Unit Manager/supervisor increases your level of accountability for promoting and ensuring a positive work environment at [redacted]. Per OP 135.3, "Employees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others."

Your ongoing conduct and interactions with others have not only been disruptive to the work environment, culture, and efficient, effective operation of the facility, but also demonstrate a lack of professionalism and respect for others in the workplace. Throughout the investigation and due process proceedings, you have denied all allegations, despite multiple witness reports, and failed to take any accountability for your actions. Instead, you have deflected and blamed others. As a result, you have undermined your effectiveness as a supervisor, created liability for the Department, and undermined the Healing Environment at [redacted].

Additional policies and procedures of relevance to the offenses and facts noted above, which your actions/inactions have violated include the following:

DOC OP 145.3, Equal Employment Opportunity, Anti-harassment, and Workplace Civility, prohibits harassment, discrimination, and bullying as defined below:

Workplace harassment: "Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:

- Has the purpose or effect of creating an intimidating, hostile or offensive work environment
- Has the purpose or effect of unreasonably interfering with an employee's work performance
- Affects an employee's employment or opportunities or compensation. Workplace harassment on the basis of race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is in violation of DOC operating procedures."

Bullying: "Disrespectful, intimidating, aggressive, and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person."

Per OP 145.3, "Behaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable."

Operating Procedure 135.3, *Standards of Ethics and Conflict of Interest*, states:

A. During work hours and on state property, employees are expected to conduct themselves in an appropriate, professional manner that is not disruptive to others or to overall productivity.

1. Any action or event occurring either during or outside of work hours (off-duty conduct) that, in the judgment of the Director, undermines the effectiveness of the employee or the DOC, or is disruptive to the work environment, may be considered a violation of the *Standards of Conduct*.
2. Such an action or event may result in disciplinary action commensurate with the offense; see Operating Procedure 135.1, *Standards of Conduct,* for additional information.

Operating Procedure 135.1, Standards of Conduct, states the following:

> Personal Conduct - DOC staff members are employed to fulfill certain duties and fulfill expectations that support the mission and values of the DOC and are expected to conduct themselves in a manner deserving of public trust. The following list is not all-inclusive but is intended to illustrate the minimum expectations for acceptable workplace conduct and performance. Employees who contribute to the success of the DOC mission:
>
> h. Work cooperatively to achieve work unit and agency goals and objectives
>
> i. Create and maintain a Healing Environment within the DOC by treating coworkers, supervisors, managers, subordinates, offenders, and other stakeholders with respect, courtesy, dignity, and professionalism; be open to communication and collaboration with colleagues in a manner that generates trust and teamwork
> j. Support efforts that ensure a safe and healthy work environment
> k. Resolve work-related issues and disputes in a professional and constructive manner and through established business processes
> l. Conduct themselves at all times in a manner that supports the mission of the DOC and the performance of their duties

Furthermore, all employees are responsible for, "Creat[ing] and maintain[ing] a Healing Environment within the DOC by treating coworkers, supervisors, managers, subordinates, offenders, and other stakeholders with respect, courtesy, dignity, and professionalism; be open to communication and collaboration with colleagues in a manner that generates trust and teamwork."

Agency Exh. 2.

The Group II Written Notice detailed the offense:

> Offenses include violations of Operating Procedures (OP) 135.1, *Standards of Conduct*, OP 145.3, *Equal Employment Opportunity, Anti-harassment, and Workplace Civility*, DHRM Policy 2.35, *Workplace Civility*, for the following:
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> - bullying;
> - failure to create or maintain a culture that fosters the Healing Environment;
> - failure to treat coworkers, supervisors, managers, subordinates, offenders, and other stakeholders with respect, courtesy, dignity, and professionalism;
> - conduct and interpersonal interactions with coworkers (e.g., tone of voice or manner you conduct yourself during a discussion) that are not in keeping with the Healing Environment and your obligation to work cooperatively and resolve work-related issues and disputes in a professional and constructive manner; and
> - intimidating, inappropriate, uncivil, disruptive, unprofessional, and hostile conduct.

On October 28, 2020, you called the Department's EEO Analyst (Investigator) assigned to investigate the allegations made against you for workplace harassment, hostile work environment, and racial discrimination. According to the investigator, you accused him of being untruthful about the investigation—specifically related to a follow up interview, which you should have had no knowledge of given the requirement of strict confidentiality noted in the *Equal Employment Opportunity Notice of Investigation* that all parties to the investigation must sign, conducted after your own interview. The Investigator had to curtail the phone call due to your unprofessional tone and inappropriate inquiries and accusations. Shortly after the call concluded that morning, the Investigator contacted his supervisor—the Employee Relations Manager—to make her aware of his concerns relative to your behavior on this call; he noted that you were using the same harassing tactics against him that you exercised towards complainants and witnesses at [redacted].

Later that same day (10/28), you sent an email to the Investigator and the Employee Relations Manager. In this email, you alleged that the Investigator was "shockingly temperamental", "loud and belligerent", and "boisterous" during your phone call. You then shared how you told the Investigator that you were "blessed to have the governor's office order a separate investigation," and stated the following: "I will be providing details of my latest interactions related to [redacted] with the governors investigators as well as a congressional liaison who emailed me Monday and called me today…".

The Employee Relations Manager replied to your concerns via email in a professional manner. However, your response to her was unprofessional, accusatory, combative, and threatening. *Email chain attached.* You accused the Employee Relations Manager and Investigator of reaching a "pre-determined outcome as I predicted" and "ignoring overt violations by my accusers". You threatened the Employee Relations Manager with filing complaints and launching investigations with "dual, reputable agencies" and told her that she would "regret your [her] stance." You concluded your email by stating, "And to claim that your investigator was respectful when in fact he was loud, belligerent, dishonest, and disrespectful is laughable. I've done my research on him and how he is in this position is beyond me."

At 2:36 pm on October 28th, the Investigator notified you that the recent EEO investigation into the multiple complaints against you had been concluded. The conclusion letter attached to this email notification informed you of the investigation's findings. In response to this communication, you emailed the Investigator (*see attached*) and stated:

> "Predictable based on how you constantly interrupted, were disinterested in providing me information I am entitled to when asked during your interview, and your lack of action and lack of interest when I provided instances of racists and bigotry. But you were tasked with a desirable outcome and you and sparkman did as instructed. The recordings will tell the story and I will prevail in court. I have done my research and find it incredible that you are in your current position. A reputable entity in addition to a member of Congress has begun a dual investigation conducted by folks with reputations beyond reproach."

The tactics you used during your communications with the Investigator and Employee Relations Manager mirror the behaviors reported by multiple witnesses during the aforementioned EEO investigation. Your interactions with these individuals demonstrate a concerning and continued pattern of bullying, toxic, inappropriate, uncivil, intimidating, and unprofessional behavior towards others in the workplace. This behavior is even more concerning in consideration of the timing—when you called the Investigator and subsequently emailed him and the Employee Relations Manager (prior to receiving the EEO investigation's conclusion letter), you were not aware the investigation was concluded. Your actions appear to be an attempt to discredit the Investigator, and bully and intimidate him and the Employee Relations Manager into concluding the investigation in your favor.

When you disagreed with the course and findings of the investigation, as well as the Employee Relations Managers' response to you, you made baseless accusations; subjected the Investigator to unnecessary and harsh criticism; directed negative, threatening, and offensive remarks towards the Investigator and Agency's leadership; deflected accountability and responsibility for your conduct; and attempted to intimidate the Investigator, the Employee Relations Manager, and the Agency. As a result of your communications to and about him, the Investigator reasonably feared for his safety and well-being.

The conduct noted above demonstrates an ongoing disregard for the Healing Environment, expectations of professionalism, respect, and civility in the workplace, and refusal on your part to work cooperatively and resolve work-related issues and disputes in a professional and constructive manner.

Relevant policies and procedures to the offenses and facts noted above, which your actions/inactions have violated include the following:

Workplace harassment: "Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:

- Has the purpose or effect of creating an intimidating, hostile or offensive work environment
- Has the purpose or effect of unreasonably interfering with an employee's work performance
- Affects an employee's employment or opportunities or compensation. Workplace harassment on the basis of race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is in violation of DOC operating procedures."

Bullying: "Disrespectful, intimidating, aggressive, and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person."

Per OP 145.3, "Behaviors that undermine team cohesion, employee morale, individual self-worth, productivity, and/or safety are not acceptable."

Attachment 1, *Guidance on Prohibited Conduct*, to OP 145.3 provides the following examples of prohibited conduct:

- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest
- Behaving in a manner that displays a lack of regard for others and/or significantly distresses, disturbs, and/or offends others
- Making disparaging remarks, spreading rumors, or making innuendos about others in the workplace
- Sending e-mails, text messages or using social media to convey inappropriate, disparaging, demeaning, or sexual messages toward or about someone

Agency Exh. 1.

As circumstances considered, the Group III Written Notice included:

Your long tenure with the Department, lack of active formal disciplinary actions (prior to the Group III and Group II issued on this date), and response to the charges have been given careful consideration. While a single Group III written notice (or two Group IIs) normally results in termination, due to the aforementioned factors, termination has been mitigated to a demotion to Casework Counselor at Central Virginia Correctional Unit #13. Further mitigation is not appropriate given the serious and ongoing nature of the behavior and offenses.

Agency Exh. 2. The Group II Written Notice included similar mitigation language. The discipline included demotion, transfer, and 10% pay reduction. Agency Exh. 1.

The Agency EEO investigator testified regarding his report and findings. He found consistency among the witnesses interviewed, including the main complainant, [redacted]F. The consistent findings were of the Grievant's hostile, negative, and unprofessional remarks toward certain staff members. The investigation was well documented. Agency Exhs. 3 and 4.

The main complainant, [redacted]F, testified to the facts of the Grievant's behavior, including the Grievant's mocking and aggressive behavior toward him, which included "stare downs," that [redacted]F found aggressive and offensive. The chief of housing programs testified that the Grievant's condescending behavior caused her and other staff members anxiety. Other supervisors also complained to her about the Grievant's behavior.

The chief of security testified that he had a negative working history with the Grievant, and the Grievant had a hostile, belligerent attitude. The director of mental health services testified to multiple negative interactions with the Grievant, including an attempt at a specific dialogue at which the Grievant was particularly hostile.

The facility warden testified that the EEO report brought to light the Grievant's bullying behavior. The warden testified that the Grievant was capable and successfully managed inmates, but he was selective with staff. The Written Notices carefully detailed the offensive conduct and applicable policies. Further, the warden found the Grievant's conduct during and in response to the EEO investigation wholly unprofessional, accusatory, combative, and threatening. This behavior is documented by the claimant's own words. Agency Exh. 1.

A former casework counselor testified for the Grievant. She testified that, contrary to the EEO investigator's report of her interview, [redacted]F asked the Grievant to mock his accent and she did not observe the Grievant engage in "stare downs" toward [redacted]F.

Corrections officer, [redacted]B, testified for the Grievant, and he told of text messages between an officer and [redacted]F, alleging that [redacted]F was spying and micromanaging. [redacted]B testified that the Grievant was positive in his interactions, and the Grievant supported him through tough events. [redacted]B was not witness to the interactions [redacted]F complained of regarding the Grievant. Another officer supporting the Grievant, [redacted]D, testified that [redacted]F would talk down to others below him in rank, and spoke over the radio inappropriately. On cross-examination, [redacted]D testified that he was aware that the Grievant and [redacted]F had some "back and forth" and kept "bumping heads."

Officer [redacted]W testified that he brought concerns to the Grievant about [redacted]F. [redacted]F unfairly pursued discipline against [redacted]W and provided a negative reference about his hair color. He believed [redacted]F behaved unprofessionally toward him. [redacted]W witnessed no negative conduct by Grievant toward others, and other officers have recommended the Grievant for assistance to other staff members.

Officer [redacted]E testified that he observed no offending conduct by the Grievant toward others, and he considers the Grievant as always "having his back." A captain, [redacted]R, testified that the Grievant is professional, a stand-up guy, and observed no offending behaviors by the Grievant.

The Grievant did not testify under oath. He effectively cross-examined the Agency's witnesses, highlighting the fact that his performance evaluations did not allude to this disciplined conduct. The Agency's response, from the warden and others on cross-examination, was that until the investigation was concluded, the mere allegations would not be included or addressed in an evaluation. The Grievant did not offer any evidence sufficient to rebut the credible evidence offered by the EEO investigator and the Agency's witnesses regarding the conduct charged in the Written Notices.

The Grievant, through argument and cross-examination, conveyed his denial and disagreement with the charges, and challenged the credibility of complainant [redacted]F. However, he did not testify to challenge the essential facts of the Written Notices. While he presented testimony of unprofessional behavior by [redacted]F, such evidence may be considered impeaching of [redacted]F's testimony. However, such impeachment does not necessarily refute the alleged conduct by the Grievant. Other witnesses consistently, and credibly, corroborated the offending conduct. The Grievant's position, while not testifying under oath and submitting to cross-examination, is that the discipline is unwarranted and retaliatory.

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 previously stated, the Grievant's burden is to show upon a preponderance of evidence that the agency discriminated against him through misapplication or unfair application of policy.

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. 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 (by a preponderance of the evidence) the misconduct of the Group III Written Notice. The Written Notice carefully set forth the factual bases and applicable policies. The Grievant did not testify under oath to refute the essential facts of his conduct. Through cross-examination of the Agency's witnesses, the Grievant challenged accounts, but the multiple Agency witnesses were fundamentally consistent and credible in support of the Written Notice. While the Grievant's witnesses credibly supported the Grievant's conduct and capabilities, such testimony did not negate the Agency's witnesses and evidence. As the warden observed, the Grievant was selective with his interactions with staff. Further, I find that the offense is appropriately considered a Group III offense under the Standards of Conduct that provide the Agency with discretion to impose progressive discipline. Violations of OP 145.3, DHRM Policy 2.30 are specifically included among Group III offenses, depending on the severity. The Agency, conceivably, and within its discretion, could have imposed lesser discipline, but its election for the more severe Group III Written Notice is supported by the evidence.

As for the Group II Written Notice, the testimony, manner, tone, and demeanor of the testifying witnesses, and the evidence of the actual email correspondence, the Agency has proved behavior concerns that the Agency and the supervisor are positioned and obligated to address. Group II offenses include, specifically, failure to comply with policy, including DOC OP 135.3 and 145.3. Operating Procedure 135.1. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Group II Written Notice. Operating Procedure 135.1, Standards of Conduct. Agency Exh. 14. By not testifying himself, the Grievant did not, under oath, deny the charged conduct and submit to cross-examination.

Further, under the Standards of Conduct, the Agency is given discretion to impose progressive discipline. When issuing a Written Notice for a Group III offense, discipline shall normally warrant termination. Demotion and pay reduction are alternative, mitigated discipline measures when the issued discipline may result in termination. The disciplinary record before the hearing officer includes the Group III and Group II Written Notices subject to this consolidated grievance. Thus, the disciplinary record supports demotion and pay reduction imposed with the Group III Written Notice.

The Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group III and II are appropriate levels for the offenses. I find the circumstances support the Agency's election to issue a Group III Written Notice and a Group II Written Notice. The Agency, conceivably, and within its discretion, could have imposed lesser discipline, however, the Agency issuance of these Written Notices is well within its discretion.

Retaliation

The Grievant filed a grievance broadly asserting the discipline is an act of retaliation. To establish a *prima facie* case of retaliation under Title VII, a plaintiff must demonstrate (1) that he engaged in protected activity, (2) that the Defendant took an adverse employment action against him, and (3) that the adverse action was causally connected to his protected activity. *See S.B. v. Bd of Educ*, 819 F.3d 69 (4th Cir. 2016); *see also Laughlin v. Metro. Wash. Airports Auth*, 149 F.3d 253, 258 (4th Cir. 1998); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant argues passionately a retaliatory animus as motivating the Agency's discipline. However, the Grievant did not testify under oath to establish the requirements to show retaliation, and the Grievant's witnesses did not establish any retaliatory motive.

To the contrary, the Agency has addressed a noticeable pattern of conduct requiring attention. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, the Agency's assessment of conduct from multiple staff members appears based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

For lack of sufficient evidence, Grievant's claims of retaliation fail.

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 it imposed less than the maximum discipline of termination. Given the nature of the Written Notices, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline further than explained above. 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 demotion 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 (or two Group II Written Notices) unless mitigation weighs in favor of a reduction of discipline. 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.

Under the *Rules*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. On the issue of mitigation, the Grievant bears the burden of proof, and he lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

Under the EDR's Hearing Rules, 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, even if he disagrees with the action. Considering 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 (Nov. 30, 2020) and Group II Written Notice (Nov. 30, 2020), with demotion, transfer, and pay reduction, are 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.

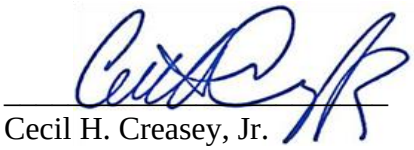
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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].

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

2 Agencies must request and receive prior approval from EDR before filing a notice of appeal