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. 11682

Hearing Date: June 4, 2021
Decision Issued: June 16, 2021

PROCEDURAL HISTORY

On January 14, 2021, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and failure to follow instructions and/or policy.

On February 1, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 19, 2021, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On June 4, 2021, a hearing was held in person at the Agency's facility.

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.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

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."

Policy 1.60, Standards of Conduct, provides that employees who contribute to the success of an agency's mission, among other expectations:

- Perform assigned duties and responsibilities with the highest degree of public trust.
- Meet or exceed established job performance expectations.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

A Group II offense includes acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level 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. A Group II Written Notice may include suspension of up to 10 workdays. Agency Exh. 4.

Regarding the program for Disadvantaged Business Enterprises (DBE), the Agency's Civil Rights Division Program Manual provides:

> The District Civil Rights offices (DCRO) are responsible for assuring compliance with federal DBE regulations within their districts. Their responsibilities shall include, but not be limited to the following:
>
> - Visiting projects to review DBE activity with the Project personnel and contractors. The DCRM will assess the work activities and related administrative features of the DBE's performance throughout the duration of the project for compliance with the DBE program regulations.
> - Notifying the prime contractor immediately of any problems identified with DBE compliance. The DCRO will work cooperatively with the prime contractor for possible resolution and corrective action.
> - Schedule and conduct compliance reviews on 100% of projects with DBE requirements and develop reports in the appropriate format.
> - DBE Compliance Reviews must reflect accurate and recent project

Agency Exh. 6.

The Offense

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 civil rights specialist, with many years of service and with a prior active Group I Written Notice for failure to report to work without notice.

The Group II Written Notice, issued by the Grievant's supervisor on January 14, 2021, detailed the facts of the offense, and concluded, "You have displayed unsatisfactory work performance as well as failure to follow my instructions and policy by not completing compliance reviews. This is a violation of DHRM Standards of Conduct, Policy 1.60." Agency Exh. 2. The specific charged misconduct is failure to complete compliance reviews of Disadvantaged Business Enterprises (DBE) as required of the Agency by federal regulation and as specifically instructed and assigned.

As circumstances considered, the Group II Written Notice reflected the conclusion that the factual defense made by the Grievant during the due process meeting was insufficient to warrant reduction of the offense.

The Grievant's supervisor, the district civil rights manager, testified consistently with the facts alleged in the Written Notice. He testified regarding the Agency's required responsibilities to certify the work of DBEs. An audit in October 2020 revealed that one of the Grievant's assigned cases to certify DBE compliance lacked the required certification from a time in October 2019. The process of certification requires review of the applicable contracts and going onsite for viewing and verifying the DBE's actual work. The civil rights manager testified to the Grievant's deficiencies in seeing to her certifications as far back as 2013, documented by email. Agency Exh. 13. The civil rights manager's expectation were, again, documented by email in May and June 2019. Agency Exhs. 14, 15, 16. If the Grievant, or any staff member, had difficulty with obtaining the access for certifications, such issue must be reported. In this case, the Grievant did not. The civil rights manager testified that he has been rather lenient on the Grievant over the years regarding her performance, not issuing discipline for the unsatisfactory performance on DBE certifications until now. Determining when a DBE will be onsite on a project and certifying is the Grievant's proactive responsibility—she should not await notification from anyone.

When asked on cross-examination about a consultant's review of the DBE at issue in October 2019 (on the Grievant's behalf), the civil rights manager testified that it was the Grievant's responsibility, notwithstanding the consultant's involvement and assistance, to complete the DBE certification, and it was not completed.

The Agency's central office human resources manager testified that it was her recommendation, based on the facts of the misconduct, to issue a Group II Written Notice. She testified that the Grievant admitted to the conduct and stated that the certification "slipped through the cracks."

The Agency's director of civil rights division testified that the Grievant, during the grievance step process, did not add anything to the fact of her failure to make the required certification. In the highway construction process, one must "adapt and adjust" constantly to changing schedules and conditions, and that failure to certify DBE risks federal funding for the

Agency. She also testified that the civil rights manager erred on the side of giving the Grievant so much grace for her deficiencies. When challenged on cross-examination about whether all employees are similarly disciplined for missing a DBE certification, she testified that she did not know, but that this Grievant had certainly not been disciplined for every violation.

The Grievant testified that she did not readily recall the facts of this missed certification in October 2019 because it was not brought to her attention until a year later. During the pre-disciplinary and grievance steps, she did not remember that a consultant made the onsite certification visit for her. Now, based on newly obtained and recalled information, the Grievant relied on a consultant to make the onsite visit. Grievant Exh. 13. The Grievant testified that she interpreted the consultant's email report to indicate that he would complete the certification. Grievant Exh. 8. However, the Grievant acknowledged that it was her project and her responsibility. The Grievant also testified that her own review of projects shows that other DBE certifications are missing.

On rebuttal, the civil rights manager testified that this testimony from the Grievant was his first notice of other instances of missing certifications, and he will investigate further to treat everyone consistently.

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.

While the Grievant minimized the essential facts of the offense, I find the Agency's witnesses credibly established the Grievant's responsibility for the DME certification and that she failed to accomplish this responsibility. The testimony, manner, tone, and demeanor of the testifying witnesses sufficiently prove by a preponderance that the Grievant was aware of the priority of making the DME certifications and that she failed to make the certification as described in the Written Notice. The Written Notice references other reminders that post-date the missed certification of the importance of these certifications, but that shows a consistent message and emphasis from the Agency. The Grievant's position is one challenging the severity of the offense and presenting mitigating circumstances.

Thus, the Agency has proved the behavior that the Agency and the supervisor are positioned and obligated to address. Group II offenses include, specifically, acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, violations of policies, procedures, or laws. A Group II Written Notice may include suspension of up to 10 workdays. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct as charged in the Group II Written Notice. The Agency, conceivably, could have imposed lesser discipline, but its election for a Group II Written Notice and job termination is within its discretion to impose progressive discipline.

The Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group II is an appropriate level for unsatisfactory work performance and failure to follow instructions and policy. I find the circumstances support the Agency's election to issue a Group II Written Notice, without suspension. 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 it imposed less than the maximum discipline for a Group II Written Notice. Given the nature of the Written Notice, as decided above, the impact on the Agency, 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 notice (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

Suspension is the normal disciplinary action for a Group II Written Notice unless mitigation weighs in favor of a reduction of discipline. Here, the Agency elected not to impose suspension. 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.

Although the Grievant claims to have uncovered other instances of missing certifications, there is no evidence that management was aware of these instances, if they exist. There is no evidence of disparate treatment. The Grievant's length of service and evidence of her good work performance and record might very well justify lesser discipline, in management's discretion. Under the *Rules*, however, an employee's length of service and 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 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 II Written Notice 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.

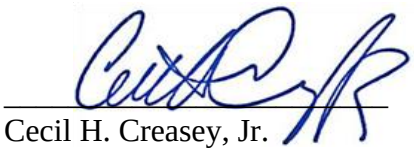
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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.[1]

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

[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