Issue: Group II Written Notice (workplace harassment); Hearing Date: 07/15/19; Decision Issued: 08/28/19; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 11336; Outcome: Partial Relief; **Administrative Review Request Received 09/04/19; EDR Ruling No. 2020-4982 issued 10/01/19; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11336

Hearing Date: July 15, 2019
Decision Issued: August 28, 2019

PROCEDURAL HISTORY

On November 29, 2018, Grievant was issued a Group II Written Notice of disciplinary action for violating the Workplace Harassment Policy and Title VII by engaging in workplace harassment towards an employee on the basis of her disability; creating hostile work environment; violating the Agency's EEO Policy and Title VII for disability discrimination; and violating DHRM Standards of Conduct and VDH Code of Ethics Policy by engaging in bullying behavior towards others in the workplace.

On January 2, 2019, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 8, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 15, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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

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 raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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 Virginia Department of Health employs Grievant as a Human Resources Analyst I at one of its facilities. She serves as a Human Resource Manager at one of the Agency's Local Health Departments.

Ms. M worked as a Human Resource Technician I and reported to Grievant. Ms. M began working for the Agency on August 29, 2016. She was a full time city employee and a part-time State employee. Ms. M sometimes was a poor performer. She repeatedly made mistakes that frustrated Grievant and Ms. M's coworkers. Ms. M sometimes placed herself at risk of exhausting her leave balances. Her leave was governed by City policies.

Ms. M was diagnosed with post-traumatic stress disorder ("PTSD") in 2001. In July 2017, Ms. M did not tell Grievant her diagnosis but shared with Grievant that Ms. M was experiencing stress. Ms. M was re-diagnosed with PTSD in January 2018.

In January 2018, Grievant's supervisor reviewed several leave sheets processed by Ms. M and noticed numerous simple errors such as dates not matching and signatures missing. Grievant's supervisor brought his concerns to Grievant and provided her with examples of the errors. Grievant changed the workflow so that Grievant reviewed the documents for errors prior to the documents being given to Grievant's supervisor.

In February 2018, Ms. M told Grievant she was diagnosed with PTSD. Ms. M told Grievant that Ms. M had general anxiety disorder and PTSD. Ms. M told Grievant Ms. M needed to "destress" by "closing my door, looking out the window, and not being bombarded." Grievant told Ms. M to do whatever she needed to "get yourself together."

Ms. M requested approval to telecommute. On March 20, 2018, Grievant granted Ms. M's request.

Grievant allowed Ms. M to use "flex time" to adjust her schedule if she came in late. In an email dated May 21, 2018, Grievant told Ms. M "you will always be allowed to flex when asked."[1] On June 7, 2018, Ms. M came to work late because "my doctor contacted me this morning to inform me that my appointment time changed."[2] Grievant granted Ms. M's leave requests.

Ms. M liked to keep the door to her office closed in order to reduce her stress level. Grievant asked Ms. M why she kept her door closed and Ms. M said that doing so kept her environment safe and calm.

Ms. M believed that Grievant "nitpicked me" but Grievant's oversight was reasonable given Ms. M's poor work performance. Ms. M admitted that in her attempts to rectify mistakes she made more mistakes. She admitted she "self-sabotaged" because she was not confident in her abilities.

On April 17, 2018, a supervisor sent Grievant a memorandum stating that an employee sought assistance from Ms. M and the employee "felt offended and disrespected by the interaction that she had this afternoon with [Ms. M]." The employee left Ms. M's office "very angry because she felt she had been treated in a rude and disrespectful manner" by Ms. M.[3]

Grievant met with Ms. M in April and June and told Ms. M that Ms. M was not completing payrolls without errors as required.

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[1] Grievant Exhibit 6.

[2] Grievant Exhibit 7.

[3] Grievant Exhibit 16.

Grievant complemented Ms. M when Ms. M performed well. For example, on April 20, 2018, Grievant sent Ms. M an email, "Good job! No issues or errors during my review for pay period ending 4/20!"[4]

Ms. M was responsible for posting information about a job opportunity with the Agency. The Director wrote supplemental questions for applicants to complete. Ms. M received the questions and edited them without permission to do so. Ms. M posted her revised questions instead of the Director's original questions. On May 15, 2018, the Director sent Grievant an email complaining of a significant change in his screening questions. He objected to the inappropriate grammar that made the questions illogical and would result in considerably more work on his part to screen appropriately. The Director asked Grievant to look into why and on whose authority the change was made.

On June 1, 2018, Grievant met with Ms. M and sent Ms. M an email as an "official verbal counseling" to address Ms. M's "erroneous change that you made" to the Director's supplemental application questions. Grievant also addressed Ms. M's "nonchalant reaction (as you called it) to be that you find having such error acceptable in a day's work." Grievant added, "I truly welcome us both trying any method that you think would be helpful for you to meet performance expectations. *** I do believe that you hold yourself to a high performance standard and that you will do all that you can to surpass this. I look forward to our next discussion. Please let me know if there's anything I can do to help you."[5]

On June 6, 2018, Grievant sent Ms. M an email:

> As per our conversation, while I appreciate you sharing your reason for this hesitation on discussing the subject, it is because we are Human Resources that I fully expect and require you to follow HR policies as well as enforcing them (this includes proper and timely reporting of possible violations to management as soon as possible so appropriate investigation and action can be taken). It is not acceptable in my book to hear my staff claiming that there has been an evident ongoing policy violation but they themselves never report the issue to management to investigate.[6]

Ms. M worked 35 hours per week for the City and five hours per week for the State. Ms. M asked Grievant if Ms. M could eliminate her five hours of State time and only work 35 hours per week. Ms. M wanted an earlier start time for her shift in order to attend medical appointments in the afternoon. She wanted to attend weekly appointments with her therapist that began between 4:00 p.m. and 4:15 p.m. Ms. M wanted to change her work schedule to begin at 8 a.m. and end at 3:30 p.m. with a 30 minute lunch period. Ms. M, however, did not tell Grievant why she wanted to begin her

[4] Grievant Exhibit 17.

[5] Grievant Exhibit 21.

[6] Grievant Exhibit 22.

shift earlier. In other words, Ms. M did not tell Grievant Ms. M wanted to change her shift to allow her to attend medical appointments.

On June 8, 2018, Ms. M sent Grievant an email:

> I would like to ask that effective Monday, June 11, I revert to the adjusted schedule of 8:30 a.m. to 4 p.m., Monday to Friday with a 30 minute lunch break that we agreed upon 10/26/2016. On the days where CIPPS entry is required I would like to begin work at 7:30 a.m. I fully understand that you allowed me to begin working at 7:30 as a privilege and completely understand your right to deny my request. Should any request to begin at 7:30 a.m. be denied, I'd like to accept a reduction of 30 minutes in Wage time reporting and request an 8 a.m. start time when CIPPS is required keeping the same end time of 4 p.m.

On June 11, 2018, Grievant sent Ms. M an email:

> Exception for today's schedule adjustment to 8:30 a.m. to 4 p.m. was granted on Friday because of business needs (the scheduled on-boarding of [name]), but not as a change to your new work schedule. I mentioned to you that future on-boarding can be scheduled to begin at 9:30 a.m. The need to start on-boarding at 9 a.m. is no longer a hard requirement since the longest on-boarding has been taking about 1.5 hours instead of the previous 2 – 2.5 hours because you no longer have to go into details regarding VDH benefits as we emailed the candidates all of the materials ahead of time and VDH Benefits Administrator also provides monthly webinar.
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> And, as explained previously, I have more need of your support until at least 4:30 p.m. daily and almost all of our staff (including supervisor/manager's) are working until 4:30 p.m. (some work later) thus they can also use your support instead of coming to me directly or having to return the next day to find you (when I'm too busy to assist them). Although we briefly changed your schedule to end at 4 p.m. shortly after you started working to test it out (from 10/2016 to 12/02/2016), your scheduled end time has always been at 4:30 p.m. before and after that timeframe.
>
> Much consideration also went into approving your request to reduce work schedule about 20 hours/month while the Administration Division is working on requesting to make your position full-time (i.e. being flexible and considerate of your current request is potentially creating a challenge for us to meet our goal). It was agreed that this reduction would be temporary as my hope in goal is to convert the HR Tech I position into full-time status by the following fiscal year. I believe we've been both understanding and flexible, but based solely on the fact that you simply

want to work less hours at this point in time, I can't comprehend or justify the need to negotiate yet another 30 – minute reduction here and there.

Your new schedule shall remain as previously stated, which is 9 a.m. to 4:30 p.m. However, I will revisit the subject after three months' time to see how the schedule is working for you and [Local Health Department]. We will see whether changes should/could be made then, might be for more or less hours or different start/end time.[7]

Grievant became concerned about a task Ms. M failed to perform. On June 25, 2018, Grievant sent Ms. M an email:

You explained to me that you didn't take action after receiving the email because I did not say that you should. However, the email referenced was addressed directly to you, with me being CC as FYI and the request was clear and made perfect business operation sense since [employee] was leaving [Local Health Department] and [another employee] is her direct supervisor. If you were still uncertain or if you wanted me to validate before taking action, you could've followed up with me instead of leaving it incomplete.

We all have ownership of certain responsibilities. It doesn't benefit either of us when you do not take action and do not follow up, then use my lack of response to an email that was addressed to you as a justification for why it wasn't done. I need you to stand up and take action as well as ownership for your decision.

We cannot continue to operate like this. At this juncture, you are demonstrating two extremes. On one end, you are approaching me for directions on many things that I expect you to be able to decide or find out on your own, given your almost two years at [Local Health Department]. At the other end, when you don't ask questions … some of the tasks that were left incomplete, not followed up in a timely fashion, or completed incorrectly until someone or myself inquire about it.[8]

On June 26, 2018, Ms. M sent Grievant an email:

Earlier this year, mid-February I believe, I informed you of my medical situation. Following the diagnosis received I have been attending regular appointments with a clinician. I am in need of and would like to submit the required paperwork to request FMLA. Upon reviewing my leave balance, scheduled appointments, and the City policies, I've noticed that I will not

[7] Agency Exhibit 18.

[8] Agency Exhibit 22.

> have enough leave to cover my appointments and possible absences. This is disheartening as I've requested an adjusted schedule and neither of my proposed schedules work for you because you could not comprehend or justify my need. When you find a time that's convenience for you, I'd like to know my options regarding taking leave without pay now versus later. No matter the solution, I will incur a hardship that will result in unpaid leave but would like to minimize the adverse effect of my finances.[9]

Ms. M contacted the City HR staff and obtained the necessary FMLA paperwork. Ms. M submitted that paperwork to Grievant.

Grievant drafted a Memorandum dated July 2, 2018 setting forth a 90 – Day Performance Improvement Plan for Grievant.[10] Grievant wrote, "[s]ince April 2018, I have been formally counseling you and bringing several concerns to your attention regarding your performance because previous informal communication did not result in a positive change in your performance." Grievant outlined five items of concern regarding Ms. M's work performance. Ms. M was to meet periodically with Grievant to discuss Ms. M's work performance. The first meeting was scheduled for July 16, 2018.[11]

On July 13, 2018, Ms. M filed an internal EEO complaint with the Agency Office of Human Resources. Ms. M claimed that Grievant discriminated against her based on her disability and subjected her to a hostile work environment. The EEO & ER Division Director began an investigation. It is not clear that Grievant was aware Ms. M had filed the complaint. On July 13, 2018, the EEO & ER Division Director sent Ms. M an email:

> I had an opportunity to research the possibility of processing your reasonable accommodation under the State's ADA policy. Since you are a city employee it would have to be done under the City's ADA process. I encourage you to reach out to your HR contact with the city to start the process.[12]

On July 16, 2018, Ms. M sent Grievant an email indicating she was not feeling well and would be leaving the office. Ms. M also wrote, "I'm also requesting that we

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[9] Agency Exhibit 23.

[10] During the hearing, Ms. M claimed she asked to be on performance improvement plan because she felt Grievant's nit picking was excessive and she wanted clear guidelines. Ms. M's PIP included weekly meetings with Grievant. Ms. M claimed that Grievant began weekly meetings after and as a result of sharing personal information about having PTSD with Grievant. Ms. M's claim is not credible. Placing a poorly performing employee on a PIP is a reasonable approach for a supervisor to address an employee's poor performance.

[11] The PIP lists the first date as July 16, 2018 at 3 p.m.

[12] Agency Exhibit 29.

reschedule our first PIP meeting to a later date." Ms. M did not explain why she wanted a later date for their meeting. Grievant replied, "I will reschedule the PIP meeting."[13]

On July 16, 2018 at 2:15 p.m., Grievant attempted to reschedule the PIP meeting for July 17, 2017 at 3 p.m. due to Ms. M's early departure on July 16, 2018. Grievant sent Ms. M a calendar invitation to the meeting. On July 17, 2018 at 9:23 a.m., Ms. M sent Grievant an email, "I do not feel well and would like to reach out to you later on a better time to meet."[14]

On July 17, 2018, Grievant needed to get documents from Ms. M's office. Grievant placed a "sticky note" on Ms. M's closed office door to make Ms. M aware of Grievant's request. Grievant waited several hours but Ms. M had not provided Grievant with "requested copies of missing forms/policies". Grievant wanted to know why Ms. M had canceled their first PIP meeting. Grievant went to Ms. M's office and knocked on the closed door. Grievant opened the door and attempted to close the door to speak privately with Ms. M. Ms. M asked that the door remain open and Grievant left the door open as she spoke with Ms. M from the doorway. Ms. M returned to the seat behind her desk. Grievant told Ms. M that Grievant was concerned about Ms. M's behavior. Grievant said she hoped they could meet before the end of the week because the PIP required that they meet every week.

Grievant left Ms. M's office and spoke with her supervisor[15], the Manager, and two City Human Resource employees. Grievant was concerned that Ms. M was not being productive and was rude to Grievant when they met. Grievant obtained permission from a city manager to send Ms. M home for the day.

Approximately ten minutes after the encounter, Grievant returned to Ms. M's office and told Ms. M she was being sent home on paid administrative leave based on Grievant's concerns about Ms. M's behavior at work.

On July 17, 2018 at 12:48 p.m., Grievant sent her supervisor an email:

> This is to confirm that following my brief conversation with City HR and you, I've spoken to [Ms. M] to inform her that I'm sending her home on Administrative Leave with Pay based on my concerns regarding her behavior at work thus far today. She has left the office.[16]

On July 17, 2018 at 4:18 p.m., Grievant sent Ms. M a text message:

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[13] Agency Exhibit 30.

[14] Agency Exhibit 33.

[15] Ms. M did not tell Grievant's supervisor that Ms. M had any medical conditions.

[16] Grievant Exhibit 12.

> Your Administrative Leave with Pay will end at 4:30 pm today. You are expected to report to work at your normal scheduled hours tomorrow. Please acknowledge.
>
> Ms. M ignored Grievant's text and did not respond.
>
> On July 18, 2018 at 1:50 p.m., Grievant sent Ms. M an email:
>
> It is noted that you did not communicate further after my email response at 4:40 p.m. on 7/17 and that you chose not to report to work today. Thus you are absent without leave (AWOL) approval. Your timesheet for payroll reporting shall reflect this time as leave without pay (LWOP).
>
> I want to reiterate that you are expected to report to work at your normal scheduled hours tomorrow and leave would not be approved. Please respond by 5:30 p.m. today should you have any comments or questions and to acknowledge receipt. I will also be sending you a text message.[17]
>
> On July 18, 2018 at 1:53 p.m., Grievant sent Ms. M a text message:
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> As specified in my email sent earlier, your absence today is considered AWOL. You are still expected to report to work at your normal scheduled hours tomorrow. Please acknowledge by 5:30 pm today.[18]

Ms. M had requested leave for July 18, 2018, but that request had not been approved.

On July 19, 2018, Ms. M sent Grievant an email advising, "As a result of the recent interactions between you and I and the increasingly hostile work environment I am terminating my employment as of Friday August 3, 2018."[19]

The Agency's EEO Director trained human resource staff that "there were no magic words" necessary for an employee to use to trigger the Agency's obligation to begin guiding an employee regarding the ADA, Rehabilitation Act, or State disability policies. If an employee mentioned having a medical condition, the employee's supervisor was expected to "press pause" and seek guidance regarding how to address the employee's possible disability.

After learning of Ms. M's PTSD diagnosis in February 2018, Grievant did not provide Ms. M with any information or guidance regarding the applicability of the Americans with Disabilities Act and the opportunity for reasonable accommodation for

[17] Agency Exhibit 38.

[18] Agency Exhibit 38.

[19] Agency Exhibit 35.

her disability. Grievant did not contact the Agency's Human Resource Office or the City's Human Resource Office for guidance to ensure the Agency was in compliance with the requirements of the ADA. Ms. M was aware of the provisions of the ADA but did not know the ADA applied to her since she was not a State employee.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[20] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[U]nsatisfactory work performance" is a Group I offense.[21] In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was responsible for supervising Ms. M and that supervision included making Ms. M aware of her options under the Americans with Disabilities Act. In February 2018, Ms. M made Grievant aware Ms. M suffered from PTSD. Grievant should have recognized that Ms. M's PTSD could have met the requirements for a disability under the ADA and that an interactive process should have been initiated to determine if a reasonable accommodation was necessary for Ms. M. Instead, Grievant took no action. Her failure to take action was an oversight and unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

The Agency alleged Grievant should receive a Group II Written Notice for engaging in workplace harassment on the basis of Ms. M's disability and creating a hostile work environment for Ms. M. The Agency alleged Grievant violated DHRM Standards of Conduct and VDH Code of Ethics by engaging in bullying behavior towards Ms. M. The Agency failed to substantiate these allegations.

DHRM Policy 2.35 governs Civility. This policy provides:

> The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace. Behaviors

[20] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[21] See Attachment A, DHRM Policy 1.60.

that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

Employees and applicants for employment seeking to remedy workplace harassment on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, political affiliation, veteran status, or disability may file a complaint.

Discriminatory Harassment is defined as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, political affiliation, veteran status, or disabilities, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Bullying is defined as:

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. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment. Behaviors may be discriminatory if they are predicated on the targeted person's protected class (e.g., using prejudicial stereotyping or references based on the targeted person's characteristics or affiliation with a group, class, or category to which that person belongs, or targeting people because they are in a protected class).

Non-Discriminatory Workplace Harassment is defined as:

Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class.

A "reasonable person" standard is applied when assessing if behaviors should be considered offensive or inappropriate.[22]

The Agency argued that Grievant harassed Ms. M because of Ms. M's disability and created a hostile work environment for Ms. M.

[22] See, Policy Guide - Civility in the Workplace.

A reasonable accommodation does not include ignoring an employee's poor work performance. Grievant was not obligated to disregard Ms. M's continuing errors and mistakes in her work performance. Grievant was engaged in proper managerial supervision by identifying Ms. M's mistakes and seeking to have Ms. M correct those mistakes. The Agency did not show that Grievant's method of communicating with Ms. M was unprofessional or unreasonable (e.g. there was no evidence of Grievant yelling at Ms. M or repeatedly berating Ms. M in front of co-workers, etc.).

The Agency argued that Grievant's failure to grant Ms. M's request for an earlier start time was retaliatory and/or intended to create a hostile work environment for Ms. M. Ms. M requested to alter her schedule on June 8, 2018. The evidence showed that Ms. M did not disclose the real reason why she wanted earlier start time until June 26, 2018. Grievant's failure to grant the earlier start time on June 8, 2018 was based upon the Agency's legitimate business needs -- namely, to have Ms. M available when other staff were working and in need for her assistance. Grievant did not deny Ms. M's request for any improper reason.

The Agency argued Grievant placed Ms. M on a Performance Improvement Plan that imposed unreasonable performance expectations. Ms. M was placed on a PIP because she was a poorly performing employee. The Agency did not establish that Ms. M's performance expectations were unreasonable. Poorly performing employees should be placed on PIPs in order to provide guidance as to how to improve their work performance. The PIP identified Ms. M's performance deficiencies, actions required to correct deficiencies, and how compliance would be measured. Grievant acted appropriately by placing Ms. M on a PIP.

Ms. M's perception of being harassed by Grievant was not credible. When an employee performs poorly, it is not unusual for that employee to receive heightened scrutiny from the employee's supervisor. Ms. M was a poorly performing employee. Grievant devoted more attention to Ms. M than she might otherwise have done because of Ms. M's poor performance. Grievant's objective was to correct inadequate work performance which was one of her job duties. Ms. M asserted that Grievant was "nitpicking" Ms. M. It is understandable that Ms. M would feel she was being nitpicked but Ms. M's perception is not significant unless the Agency can also show the nitpicking was for an improper purpose. In this case, to the extent Ms. M was being nitpicked it was because Ms. M continued to repeat mistakes and perform poorly and Grievant was trying to correct the work performance of a poorly performing employee. For example, on July 17, 2018, Ms. M described Grievant's harassment as "unbearable and more aggressive as time goes on" because:

> [Grievant] just knocked on my door asking me why I cancelled our meeting, even though my message in the declined email states why. She attempted to tell me she hopes I am able to meet with her before the end

> of the week because per the Personal Improvement Plan we are to meet every week.[23]

Grievant's objective was not to harass Ms. M -- it was to comply with the Personal Improvement Plan. What Ms. M perceived as harassment was simply Grievant attempting to complete her supervisory duties.

The Agency alleged Grievant did not allow Ms. M to close her door in order to destress. The evidence showed that Grievant's supervisor observed Ms. M's door frequently closed and sometimes all day. His concern was that Ms. M did not put a "sticky note" on her door to explain why her door was closed and that Ms. M often failed to indicate on an office board when she was out of the office. It appears that Ms. M was allowed to have her door closed. The Agency alleged Grievant sent Ms. M home on July 18, 2018 because Ms. M had her door closed. Grievant did not send Ms. M home because she had her door closed.

The Agency alleged Grievant engaged in workplace bullying of Ms. M and other employees by being "nasty, rude, sneaky, and underhanded". The Agency did not present sufficient evidence to support this allegation. Grievant did not violate DHRM Policy 2.35 governing Civility. Grievant did not engage in 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.

Va. Code § 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 Resource Management …."[24] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and 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 this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

[23] Agency Exhibit 34.

[24] Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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