

Issue: Group III Written Notice with Termination (violating Civility in the Workplace policy and insubordination); Hearing Date: 06/18/19; Decision Issued: 07/17/19; Agency: DVS; AHO: Lorin A. Costanzo, Esq.; Case No. 11373; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT AND DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 11373

**Hearing Dates: June 18, 2019
Decision Issued: July 17, 2019**

PROCEDURAL HISTORY

On April 11, 2019 Grievant was issued a Group III Written Notice with termination effective 4/11/19 for Violation of Policy 2.35, *Civility in the Workplace* and for *Insubordination* (Written Notice Offense Codes 39 and 56). The Written Notice further provided:

Employee continues to be insubordinate to Supervisor. He also demonstrates behavior that is rude, inappropriate and unprofessional. Bullying, behaviors that undermine team cohesion, staff morale, individual self-worth productivity, and safety are not acceptable ¹

On May 6, 2019 Grievant filed a *Grievance Form A* challenging the Group III Written Notice with termination issued April 11, 2019. The grievance was qualified in full noting "Grievances challenging formal discipline automatically qualify per Section 4.1 of the GPM". Hearing Officer was appointed effective May 21, 2019. A pre-hearing telephone conference call was held May 24, 2019 in which Grievant, Agency Advocate, and Hearing Officer participated. By agreement, the grievance hearing was held on June 18, 2019.

On June 18, 2019, prior to the hearing commencing, the parties and Hearing Officer met at the hearing site and discussed a number of matters related to the hearing and witnesses. Agency moved Agency Advocate be allowed to testify as a witness in the hearing and Grievant did not object. There being no objection, Agency Advocate was permitted to testify at hearing if called as the Agency's first witness.

At hearing, one Agency witness, not employed by Agency, was not available to appear in person on the hearing date. Hearing Officer attempted to secure a timely alternate date for the witness to testify in person with the parties present but was not able to do so, and the witness was permitted to testify via speaker phone on June 18, 2019 over Grievant's objection.

¹ G. Ex. 17; A. Ex.12

Written closing statements/arguments were submitted to the Hearing Officer by the parties on June 25, 2019.

On June 28, 2019 Hearing Officer contacted the parties by e-mail noting copies of *Grievance Form A* differed. Copies of the Form A from Grievant's Exhibits, from Agency Exhibits, and the *Form A* received from EDR were provided each party. Hearing Officer further stated Grievant appears to have presented a draft copy of the *Form A*. he subsequently filed in this matter and Agency appears to have presented a copy of the *Form A*. identical to the EDR furnished copy of the *Form A* except that bullet symbols did not appear next to certain of the line items listed. Hearing Officer stated his intent to utilize the *Form A* provided by EDR subject to receiving input from the parties.

On 7/1/19 Agency acknowledged by e-mail his review of the documents and belief the issue as to Agency's copy was a copy issue causing the bullets not to print correctly. On 7/1/19 Grievant indicated no objections to the copies Agency has presented.

A copy of the EDR furnished *Form A*. will be submitted with the record in this cause and utilized in this cause.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency 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 reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

As this is a disciplinary matter, the burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.²

² Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

HEARING and EXHIBITS

The following appeared at the grievance hearing:

Grievant
Agency Advocate
Agency Party Representative at Hearing
7 Agency Witnesses: Advocate
Supervisor
FSM
Clerk
Aide#1
Aide#2
Aide#3

1 Grievant Witness: HR Director

Exhibits were admitted into evidence *en masse* by agreement of the parties. Agency's exhibits are tab numbered 1 through 12 and A1 through A-27. Grievant's exhibits are tab numbered 1 through 31 (with tabs 30 and 31 intentionally left blank). Additionally, by agreement of the parties, two agreed exhibits (marked Agreed Exhibits 1 and 2) were admitted at hearing.

Grievant's exhibits are referenced herein as "G. Ex. ___" with the tab number inserted in the "___" and Agency's exhibits are referenced herein as "A. Ex. ___" with the tab number inserted in the "___". The two agreed exhibits are referenced herein as Agreed Exhibit "___" with the exhibit number inserted in the "___".

FINDINGS OF FACT

After reviewing the evidence admitted, including the testimony of all witnesses, and observing the demeanor of each of the witnesses, the Hearing Officer makes the following findings of fact:

01. Grievant was employed by Agency as a Food Service Operations Manager at Agency Facility. His duties involved supervising other employees. Grievant's direct supervisor was the Food Service Director ("FSD" or "Supervisor"). Grievant was employed by Agency from January of 2013 until his termination on April 11, 2019.³

02. Agency Facility provides residential and other services, including dietary services, to Virginia veterans.⁴

03. Management received a complaint from an employee concerning Grievant. In investigating this complaint additional employees were called in and additional complaints and matters came to light which ultimately led to issuance of a Group III Written Notice with termination.⁵

³ A.Ex. A-26.

⁴ A. Ex. A.-1 and A-27.

04. On August 15, 2017 Grievant slipped and was injured at work.⁶ He received an award of Workers Compensation benefits for the period of September 26, 2017 through October 29, 2017.⁷ From 9/28/17 to October 30, 2017 Grievant was on VSD/WC continuous leave. Also, from December 8, 2017 to January 21, 2018 Grievant on extended holiday.⁸

05. On October 10, 2017 Agency issued a Memo to "Full-Time Employees (not in *LWOP* or on *VSDP*" on October 6, 2017". As per this Memo all full-time Agency employees who were not on a Leave Without Pay ("*LWOP*") status or on Virginia Sickness and Disability Program ("*VSDP*") status on October 6, 2017 were granted 8 hours of bonus leave regarding a 4 day holiday weekend for Columbus Day.⁹

06. On December 1, 2017 Grievant filed a grievance that he improperly did not accrue or receive the 8 hour of bonus holiday leave time while he was on workers' compensation leave.¹⁰ On December 14, 2017 Agency determined the grievance did not qualify and was administratively close due to its not being presented within 30 calendar days of the date the employee knew or should have known of the management action or omission being grieved.¹¹

In a document dated January 22, 2018, Grievant contested the Agency's determination he did not present his grievance timely contending the 30 calendar days expired on December 27, 2017 and he had spoken to the EEDR Adviceline consultant and they agreed.¹²

07. On January 25, 2018 Grievant was informed his work schedule was being modified on 1/26/18 and his work shift will be 9:00 am to 5:30 pm Monday through Friday.¹³

08. On September 3, 2018 Agency informed Grievant his work hours would be from 11:00 am to 7:00 pm Monday through Fridays. Agency indicated the change was needed so that there was proper supervision of the night shift as complaints were received from residents as to the evening meal. Upon being presented this change in work hours Grievant and Supervisor discussed the half hour

⁵ Testimony.

⁶ A. Ex. 1.

⁷ G. Ex. 2.

⁸ G. Ex. 7.

⁹ G. Ex. 3.

¹⁰ G. Ex. 6.

¹¹ A. Ex. 3.

¹² G. Ex. 7 and testimony.

¹³ G. Ex. 9.

break for a meal during his shift and Supervisor agreed orally his hours were amended to be from 11:00 a.m. to 7:30 p.m.¹⁴

09. On September 14, 2018 Grievant told Supervisor, in writing, he believed she was questioning his honesty and work ethic on 9/11/18 and did not verify his work ethic or loyalty to Facility or the residents on 9/11/18. He stated Supervisor neglected her duty as Food Service Director, her actions show this failure, and she failed in her responsibility of FSD to have available all the tools an employee needs to complete their tasks. He alleged her actions showed she had a pre-existing agenda of his employment.¹⁵

10. On about December 14, of 2018 the non-management dietary staff received a \$150.00 bonus. Grievant, and the other two managers in the department, did not get the bonus as announced.¹⁶

11. On March 25, 2019 Grievant acknowledged in writing he had received and reviewed a copy of the Civility in the Workplace Policy and Procedure.¹⁷

12. In a meeting with Supervisor and other Agency management held prior to April 11, 2019 Grievant was informed in the meeting by management he was combative, argumentative, and disrespectful to his supervisor. When told this, Grievant indicated this was the way it was done in the past. In response, management instructed Grievant that is not the way it is to be done and they didn't want him to be disrespectful and raise his voice to anybody.¹⁸

CONCLUSIONS

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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

¹⁴ A. Ex. 4; G. Ex. 12.

¹⁵ A. Ex. 7.; G. Ex. 13

¹⁶ A. Ex. 10, A. Ex. 11, G. 16, and Testimony

¹⁷ A. Ex. A.27

¹⁸ Testimony.

of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.¹⁹ The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. 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 would warrant termination.

§ B. 2. b. of DHRM Policy 1.60 provides that insubordination is a Group II Offense. Attachment A: of Policy 1.60 (Effective April 16, 2008) provides violations of Policy 2.35 *Civility in the Workplace* may, depending on the nature of the offense, constitute a Group I, II, or III offense. Additionally, Section C 1. of Policy 2.35 provides that engaging in conduct prohibited under this policy or encouraging or ignoring such conduct by other shall be subject to corrective action, up to and including termination under the Standards of Conduct.

§ B. 2. of DHRM Policy 1.60 provides the examples of offenses presented in Attachment A. are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

Additionally, Attachment A. to DHRM Policy 1.60 provides that in certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agency may consider any unique impact that a particular offense has on the agency.

¹⁹ G. Ex. 20.

Policy 2.35:

Agency adopted and promulgated DHRM Policy 2.35 *Civility in the Workplace* (Effective 1/1/19) which supersedes Policy 1.80, Workplace Violence, and Policy 2.30 Workplace Harassment.²⁰ As stated in Policy 2.35, “It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, inclusion and equity. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber-bullying), and workplace violence of any kind are prohibited in state government agencies.”

Policy 2.35 provides prohibited conduct includes harassment, bullying, and workplace violence. This policy further states:

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

Both *Discriminatory Workplace Harassment* and *Non-discriminatory Workplace Harassment* are prohibited by Policy 2.35. Policy 2.35 defines the term *Non-Discriminatory Work Place Harassment* [Harassment not based on protected classes] as:

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

The term “Bullying” is defined in Policy 2.35 as:

Disrespectful, intimidating, aggressive and unwanted behavior towards 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. ...

An Employee complained to management concerning actions of Grievant occurring in the workplace. Upon investigation of this complaint, multiple employees brought matters to the attention of management regarding Grievant’s actions in the workplace. Management was concerned with the effect his behavior was having on both Agency employees and on Agency.

Upon investigation, Agency had concerns as to violations of Policy 2.35 and that Grievant’s behavior was inappropriate, unprofessional, insubordinate, rude, and undermining of team cohesion, staff morale, individual self-worth, productivity, and safety. Agency was concerned Grievant was demeaning employees, talking down to them, being sarcastic, disrespectful, and making employees

²⁰ G. Ex. 11.

feel they were dumb. Agency felt he was combative and argumentative with Supervisor, not following her instructions, changing what she had instructed employees to do, and his actions caused stress and confusion in the workplace contributing to two newly hired employees quitting.

Agency produced a number of credible witnesses who testified under oath concerning matters they had personally observed concerning Grievant's actions and how his actions affected them and/or Agency operations.

Supervisor was the Director of Food Services and Grievant's direct supervisor. Grievant raised his voice towards her and was disrespectful towards Supervisor on a number of occasions including doing so in the presence of other employees. Supervisor testified as to his often over-talking her and not letting her finish what she was attempting to tell him .

Management observed and addressed to Grievant that he was being combative, argumentative, loud, and disrespectful to Supervisor during a meeting. Management gave Grievant verbal instructions concerning disrespect and raising his voice to Supervisor. When told this, Grievant indicated this was the way it was done in the past. Management informed him this is not the way it is to be done, he was not to raise his voice, and that management didn't want him to be disrespectful or raise his voice to anybody.²¹

Management received complaints of Grievant "bad talking" Supervisor. Employees observed and testified to their observations of Grievant's interactions with Supervisor, including how he would speak to her. Grievant sometimes answered Supervisor's questions in a professional manner but sometimes answered in a sarcastic or a smart talking manner.²² Grievant actions undermined Supervisor and caused stress and confusion to employees.

Without Supervisor's knowledge, Grievant often changed policy, procedures, and instructions that Supervisor had given. This resulted in confusion and stress as to duties and in turn led to disruption in the workplace. Employees, including two newly hired employees who quit, were affected by Grievant's actions.²³

Grievant would not communicate with Supervisor, as she had requested him to do, concerning matters and problems occurring in the workplace.

In a series of e-mails relating to Supervisor's inquiry as to Grievant not knowing he was short staffed until 4:00 pm and his shift starting at 11:00 a.m., Supervisor stated, "Could you please let me know what happened between those 5 hours that there was no time for you to receive a break and do a food order?"

²¹ Testimony.

²² Testimony.

²³ Testimony.

In a response to her e-mail, Grievant e-mailed Supervisor stating, "I must say I find this line of questioning to be very appalling. ...". Also, in a subsequent e-mail Grievant stated to Supervisor, "You are correct, it is my responsibility to look at the schedule and notice the staffing issues. ... "I neglected this duty. I will also say, you neglected your duties as Food Service Director. Your actions show this failure ". Grievant, also stated to Supervisor, "It is the [FSD's] responsibility to have the correct coverage of the shift. Please verify this,..."²⁴

A number of witnesses testified to Grievant's sarcasm and attitude exhibited towards employees over an extended period and the effect it had. Witnesses testified to Grievant making them feel humiliated, treated like a child, demeaned, and dumb. Evidence was also received it was felt Grievant believed he was better than them.

FSM testified under oath to his belief Grievant didn't like him and treated him wrong. He expressed having fear for his job and feeling he was being bullied by Grievant.

Aide#1 testified under oath as to matters and her interactions with Grievant. Grievant's actions and words at work made her feel like she was not smart enough to do her job and that she was dumb. She felt he talked down to her. She characterized Grievant as often being sarcastic. She also felt he was not approachable about 40% of the time.²⁵

Aide#2, testified under oath as to matters and interactions with Grievant. She describes the work atmosphere as tense with a lot of confusion and difficulty. She also felt talked down to by Grievant. She related one example of sarcasm and being talked down to when Grievant told words to the effect of if she needed help with using a hose he would help her. Grievant would tell her and other staff *Washy Washy* on multiple occasions. This made her feel like she was a kindergardner. She also felt Grievant was unapproachable a lot of times.

Aide#3 testified under oath as to her observations. She was told by Grievant, in front of another staff member, "do you understand it looked like you had stars over your head". This and other Grievant actions made her feel dumb, stupid, and belittled. She also expressed concern with Grievant's staring at her and this made her feel uncomfortable.

Grievant worked under the supervision and direction of the Food Service Directors ("FSD" or "Supervisor"). Grievant, among other matters, was generally assigned supervisory duties related to the evening meal and Supervisor assumed duties for day shift meals. Supervisor's and Grievant's work shifts partially overlapped.

Agency presented a number of witnesses who testified under oath as to their observations of Grievant's actions in the workplace and the effect of his actions. As witnesses in this proceeding they were subject to cross examination by Grievant. Hearing Officer finds their testimony to be consistent and credible. The evidence indicates Grievant was sarcastic to employees on a number of

²⁴ G. Ex. 13: A Ex. 7.

²⁵ Testimony.

occasions, talked down to, demeaned, belittled, and denigrated employees. He caused employees to feel dumb and humiliated on a number of occasions.

The evidence further indicates that Grievant was disrespectful, combative, argumentative, and often over-talked Supervisor. Grievant gave instructions to employees that contravened what Supervisor instructed and made rule changes without informing her of the changes including changes to procedures and changing recipes.²⁶

Supervisor had communication problems with Grievant and attempted to resolve those problems. She asked Grievant to inform her if an employee does not show for work and asked to be called and informed of other relevant matters occurring during the period from which her shift ended to when his shift ended. Supervisor raised a need for improved communications with Grievant and provided her cell number to him on more than one occasion. ²⁷

Policy 2.35 prohibits harassment and bullying behaviors. *Non-Discriminatory Work Place Harassment*, harassment not based on protected classes, is a prohibited conduct and is defined as, "Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion to a person not predicated on the person's protected class." Agency has met its burden as to a violation of Policy 2.35. The evidence indicates Grievant's actions were a targeted or directed unwelcome verbal contact which denigrated employees. The evidence furthermore indicates the harassment occurred with multiple employees over time.

In issuing a Group III with termination Agency took into consideration the nature of Grievant's actions, that he supervised employees, the impact of his actions, the number of employees involved, and multiple separate events were involved over a period of time. Agency also took into consideration his actions impacted both Agency employees and the Agency's ability to perform its business.

Agency has met its burden in this cause, by a preponderance, proving insubordination and proving violations of Policy 2.35.

Grievant:

In his *Form A* Grievant raised he was bullied/targeted since going on workers compensation leave, the *Standard of Conduct* regarding applying corrective actions and progressive discipline were not fairly and consistently followed, and he was not given opportunity to improve behaviors. Grievant also contended he was not given opportunity to see documentation or to respond to allegations, he was not given feedback/documentation of poor performance during management actions, and the Director of Food Services did not effectively communicate with him.

Grievant appears to raise a number of matters as mitigating circumstances and/or affirmative defenses to discipline, including denial of due process, the Written Notice being issued on account of

²⁶ A. Ex. A19 and Testimony.

²⁷ A. Ex. A20 and Testimony.

targeting/bullying/retaliation, and policy was not fairly followed. Grievant also raised, in support of his allegations, matters including improper denial of a bonus in 2018, improper denial of a 2017 holiday leave/pay matter, the non-qualification of his 12/1/17 grievance, and harassment matters.

Pursuant to §5.8 of the *Grievance Procedure Manual*, the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. § VI. B. 2. of the *Rules for Conducting a Grievance Hearing* provides a hearing officer is charged with receiving and considering evidence in mitigation or aggravation of any offense charged by an agency.

As per the Rules for Conducting Grievance Hearings, a hearing officer does not have the authority to qualify an issue for hearing and any challenged management action or omission not qualified cannot be remedied through a hearing.²⁸ This decision addresses the April 11, 2019 disciplinary action and any mitigation and affirmative defenses Grievant raised.

Injury and Leave:

Grievant raises allegations of management retaliating, bullying, and targeting him since going on workers compensation leave or other leave. It is not contested Grievant was injured at work on 8/15/17 and was on leave related to his injury.²⁹

§9 of the *Grievance Procedure Manual* defines the term *Retaliation* as "Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in §4.1(b). of the *Grievance Procedure Manual* which addresses, among other matters:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination ... ;
3. Arbitrary or capricious performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a government authority, seeking to change any law before Congress or General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law;
5. Informal discipline- for example, terminations, transfers, assignments, demotions, and suspensions- that are not accompanied by formal discipline (a Written Notice) but which are taken primarily for disciplinary reasons.

²⁸ Rules for Conducting Grievance Hearings, Section I.

²⁹ G. Ex. 2.

To establish retaliation Grievant must show he engaged in a protected activity, he suffered an adverse employment action, and a causal link exists between the adverse employment action and the protected activity (in other words, whether management took an adverse action because the employee had engaged in the protected activity). If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.³⁰ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.³¹

Even if it were assumed Grievant engaged in a protected activity and suffered an adverse employment action, there is insufficient evidence to find a nexus or causal link existing between the protected activity and the adverse employment action. As discussed herein, Agency has presented legitimate non-retaliatory business reasons for the adverse employment action taken. Furthermore, there is insufficient evidence to find Agency's stated business reason was a mere pretext or excuse for retaliation.

For the reasons stated herein, *Retaliation* is not found in this cause and there is insufficient evidence to find issuance of the Group III Written Notice with termination was related to *Retaliation*. Furthermore, upon review of the evidence presented in this cause, there is insufficient evidence to find Grievant was targeted or bullied due to his work injury, leave, and/or participation in Workers Compensation or the Virginia Sickness and Disability Program.

Hours, leave, qualification, and bonus:

Grievant addresses work hours being changed, holiday leave not being granted him, his grievance not being qualified, and not being granted a \$150.00 bonus as establishing policy violation and proving bullying, targeting, and/or retaliation.

Grievant was a supervisor. He did have his work schedule changed on January 26, 2018 to 9:00 am to 5:30 pm Monday through Friday.³² He also had his hours changed in September of 2018.

On September 3, 2018 he was informed, in writing, his work hours would be changed to 11:00 a.m. to 7:00 p.m. Monday through Fridays. Agency witnesses testified and the evidence indicates his hours were changed to insure proper supervision as there were residents complaining of cold food being served in the evening meal. Upon being presented a document noting this change, Grievant

³⁰ *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

³¹ See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

³² G. Ex. 9.

raised concern over not having scheduled in the half hour for his meal break. Supervisor orally agreed this should have been scheduled in and agreed to his hours being amended to be from 11:00 a.m. to 7:30 p.m.³³ There were also Agency concerns he would come in and work from 10:30 a.m. to 7:00 p.m. after being informed of the 11:00 am to 7:30 pm schedule.

Agency sent a memo dated October 10, 2017 which was addressed to “Full-Time Employees (not in LWOP or on VSDP) on October 6, 2017”. This memo stated 8 hours of bonus leave (related to a 4 day holiday weekend for Columbus Day) was being granted to all full time employees who were not in a Leave Without Pay (“LWOP”) status or on Virginia Sickness & Disability Program (“VSDP”) on Friday October 6, 2017. The Memo cited the Commissioner granted 8 hours to Agency employees for them to enjoy a 4-day Holiday weekend for Columbus day.³⁴ Grievant e-mailed HR his concerns of not receiving the holiday leave while on VSDP reduced income. On October 17, 2017, Agency did inform him since he was out on STD, the pay is Monday through Friday and he cannot comp or get additional pay for holidays.³⁵

On December 1, 2017 Grievant filed a grievance as to not receiving the bonus leave. Management determined the matter was being administratively closed as the grievance was not presented to management within 30 calendar days of the date he knew or should have known of the management action or omission being grieved.³⁶

The evidence further indicates, upon the information conveyed to Agency and policy review, Agency subsequently changed their position and holiday leave was granted to Grievant.³⁷

Grievant also raises that on or about December 14, of 2018 a bonus of \$150.00 was received by the non-management dietary department staff. Grievant raised issue as to why all non-managerial employees received a bonus and he/managers did not, He contends this was improper and he was targeted by management in not receiving the bonus. Grievant challenged the definition of manager and argued as to what definition of manager Agency should have used, contending Agency used the incorrect definition of manager.³⁸ There is no evidence whether or not this matter was grieved.

None of the three managerial dietary staff members, including Grievant and Supervisor, received the bonus.³⁹ The evidence indicates a valid and non-retaliatory business reason for granting

³³ A. Ex. 4; G. Ex. 12.

³⁴ G. Ex. 3.

³⁵ A. Ex. 2.

³⁶ A. Ex. 3.

³⁷ Testimony.

³⁸ A. Ex. 10 & A. Ex. 11.

³⁹ A. Ex. 10 & 11 and Testimony..

a bonus to non-managerial staff and there is no evidence this reason was a mere pretext or excuse for retaliation.

Agency has the right and duty to manage the affairs of the Agency management had a proper business purpose for granting the bonus to non-managers only. There is insufficient evidence find to targeting, bullying, or retaliation on account of the change in his work hours, the 2017 holiday leave, his grievance not being qualified, or the 2018 bonus.

Even if it were assumed Grievant was engaged in a protected activity and suffered an adverse employment action, there is insufficient evidence to find a nexus or causal link existing between the protected activity and the adverse employment action. Agency has presented legitimate non-retaliatory business reasons for issuing the Group III and there is insufficient evidence to find Agency's stated business reason was a mere pretext or excuse for retaliation.

Grievant has the burden of proof of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Upon review of the evidence in this cause Hearing Officer does not find Grievant met his burden as to these matters and there is there insufficient evidence to find retaliation/targeting/bullying.

Harassment raised by Grievant:

Grievant contends his report of being sexually harassment was not acted upon nor investigated properly in proof of not applying policy equally to him and that the issuance of the Written Notice was due to targeting, bullying, and/or retaliation.

There was a meeting on or about January 26, 2018 where he met with with his supervisor, Administrator, and HR Director to discuss a number of matters including the 8 hours of comp/leave for Columbus day. At that meeting Grievant raised an incident which he said occurred on 1/22/18 at a time surrounding a fire drill being conducted. Grievant raised in the meeting a female employee walked up behind him, place her hands on his hips from the backside, and thrust her pelvis into his buttock while laughing.⁴⁰ He also stated at the meeting he did not want matters reported but just wanted them to know.

HR Director testified Grievant stated he did not want matters reported but just wanted them to know. Agency did investigate into matters Grievant raised and on February 1, 2018 met with the female alleged to have done the touching. The female said she didn't touch and won't touch Grievant. In a meeting with another employee who was identified by Grievant as being present and witnessing matters, the interviewed employee stated she was at the scene, the female alleged to have done the

⁴⁰ G. Ex. 8 and G. Ex. 10.

matter passed by Grievant, but she did not observe a gyration motion. The interviewed employee stated the female was going to the closet to get something.⁴¹

HR Director testified under oath Grievant stated at the he didn't want matters reported. No witness testimony was received that contested this statement or contested any matter testified to by HR Director or other witnesses to this matter.

Strong consideration is given to the burden of proof and to the testimony under oath, received from all witness. While Grievant made statements his questions to witnesses, such statements are not made under oath.

This matter occurred over a year ago. There is no evidence of any grievance related to this matter. There is no evidence of there being disciplinary action issued Grievant until April of 2019.

Grievant has the burden of proof of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstance. Upon review of the evidence in this cause Hearing Officer does not find Grievant met his burden.

Weight to evidence:

Hearing Officer is charged with giving weight to the evidence (both testimony taken under oath and documents admitted) in this cause. Opening and closing statements are not under oath. In Grievant's questioning and cross-examination of witnesses Grievant made numerous statements of facts, beliefs, opinions, theory, and interpretations as to matters. Consideration is given to Grievant not being under oath when making such statements.

Grievant admitted a typed document entitled "Notes to File", G. Ex. 8, with a typed date of January 30, 2018. The document describes an alleged matter that occurred on January 22, 2018. Hearing Officer takes into consideration no witness testified under oath to the accuracy of its representations and content.

Grievant also admitted G. Ex.19, a typed document bearing the date of April 11, 2019 purporting to provide narrative of what parties said at a meeting. One witness, who was under oath, addressed the truth and accuracy of the statements attributed to him in the document. Under oath, that witness denied and challenged the truth and accuracy of a number of statements contain therein attributed to him. No evidence was produced in rebuttal or challenging witness's testimony.

Fair and Consistent:

Grievant contends management did not follow Standard of Conduct Administrative Procedures, including applying corrective actions consistently, and he was not provide progressive discipline fairly and consistently as other employees were provided.

⁴¹ A. Ex. A3.

The *Standards of Conduct* provides Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. The *Standards of Conduct* enables agencies to terminate employees where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.

Grievant contends Agency has applied inconsistent discipline and he was treated differently than other employees. Whether the discipline is consistent with the agency's treatment of other similarly situated employees is addressed in Section VI.(B)(2) of the *Rules* and presented as an example of "mitigating circumstances" to be considered by the hearing officer. Grievant bears the burden of raising and proving this matter.

While a large number of documents as to prior counselings and matters were admitted into evidence by Grievant, there is insufficient evidence presented to find the circumstances were the same or similar as to the circumstances involving Grievant's actions resulting in his receiving the Group III. Grievant was a supervisor, the circumstances involving his actions (discussed in detail above) involved a number of matters, actions, and violations occurring over time. Grievant actions involved and affected a number of Agency employees, including those he provided supervision for and involving his Supervisor. His actions affected Agency's ability to conduct their business. He was not disciplined with a Group III with termination for any one act, occurrence, or statement but for the totality of his actions in violation of Policy 2.35 and for Insubordination.

For the reasons stated herein, Hearing Officer finds Grievant has not met his burden. There is insufficient evidence to find unfair, unequal, or mis-application of policy or a violation of the *Standard of Conduct* as to the application of fair and equal progressive discipline.

Due Process:

Grievant raised a number of allegations of due process violations including he was not given opportunity to see documentation or to respond to allegation, and was not given feedback/documentation of poor performance during management actions.

Grievant contends he was denied pre-disciplinary due process protections. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-546 (1985), the Supreme Court explained that prior to certain disciplinary actions, the Constitution generally guarantees those with a property interest in continued employment absent cause (i) the right to oral or written notice of the charges, (ii) an explanation of the employer's evidence, and (iii) an opportunity to respond to the charges, appropriate to the nature of the case. Importantly, the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."

Any defect in due process that may have occurred was cured by the due process hearing process in which Grievant was provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker, an opportunity to present evidence, and an opportunity for the presence of counsel.⁴² The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.⁴³

Based upon the full post disciplinary due process provided to Grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EDR has held they recognize that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post disciplinary actions. However, EDR has stated they are persuaded by the reasoning of many jurisdictions that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.⁴⁴

Accordingly, the Hearing Officer finds Grievant suffered no due process violation. The extensive post disciplinary due process afforded to the Grievant cured any lack of pre-disciplinary due process in this case.

Mitigating and Aggravating Circumstances:

DHRM Policy 1.60 *Standards of Conduct* allows agencies to reduce the disciplinary action if there are mitigating circumstances, such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance."

§ VI. B. 2. of the Rules for Conducting a Grievance Hearing ("Rules") provide that, pursuant to § 2.2-3005(C)(6) of the Code of Virginia, 1950, as amended, a hearing officer is charged with receiving and considering evidence in mitigation or aggravation of any offense charged by an agency. Examples of "mitigating circumstances" to be considered by the hearing officer include, but are not limited to:

⁴² *Detweiler v. Va. Dep't of Rehabilitative Services*, 705 F.2d 557, 559-561 (4th Cir. 1983).

⁴³ See Virginia Code Sections 2.2-3004(E), 2.2-3005 and 2.2-300;7; see also *Grievance Procedure Manual* §§ 5.7, 5.8.

⁴⁴ *E.g.*, *Va. Dept of Alcoholic Beverage Control v. Tyson*, 63 Va. App. 417.423-28,758 S.E.2d 89. 91-94 (2014); see also EDR Ruling 2013-3572.

- whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule;²⁶
- whether the discipline is consistent with the agency's treatment of other similarly situated employees; or
- whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.

The Rules further provide that, in making such a determination, the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness. Furthermore, 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 is charged with stating in the hearing decision the basis for mitigation.

§ VI. B. 2. of the Rules places the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard on the grievant and the agency has the burden to demonstrate any aggravating circumstances that may negate any mitigating circumstances.

§ 5.9 of the *Grievance Procedure Manual* provides, in pertinent part, as follows:

In hearings contesting formal discipline, 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 agency's discipline exceeds the limits of reasonableness (see also *Rules for Conducting Grievance Hearings*).

Consideration is given to Grievant's length of service and otherwise satisfactory work performance, however, this alone is not sufficient to mitigate disciplinary action.

Agency took into consideration the nature of the offenses, including Grievant's multiple acts and their impact on employees and the Agency. Agency determined Grievant's misconduct was of such a severe nature that a first occurrence warranted issuance of the Group III Written Notice with

termination. Policy provides that, depending on the nature of the offense, violations of Policy 2.35 may constitute a Group I, II, or III offense and Insubordination is listed in Policy 1.60 as an example of a Group II offense.

As provided in the *Rules*, a hearing officer's function is not to displace management's responsibility but to assure managerial judgment is properly exercised within the tolerable limits of reasonableness. Given the nature and effect of Grievant's multiple actions involving multiple individuals, Agency's issuance of a Group III with termination is within the tolerable limits of reasonableness. Under the *Rules*, a hearing officer is not a "super-personnel officer" and, absent there being a statutory, policy, or other violation, the hearing officer should not substitute his judgment for that of management. The hearing officer should give the appropriate level of deference to actions by management that are found to be consistent with law and policy, even if he were to disagree with the actions. In this case, as discussed herein above, Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In light of the standards set forth in the *Rules* the Hearing Officer finds that mitigating circumstances justifying reduction or removal of the disciplinary action do not exist. Agency has proven, by a preponderance of the evidence, that the disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness.

DECISION

Based upon consideration of all the evidence presented in this cause, and for the reasons stated above, Hearing Officer finds the Agency has sustained its burden of proof in this proceeding and finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, Agency's issuance to Grievant of a Group III Written Notice with termination is **Upheld**.

APPEAL RIGHTS

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

Office of Employment and 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. (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].

ENTER: 07/17/2019

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer