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 Nos. 11517, 11530

Hearing Date: June 24, 2020
Decision Issued: July 2, 2020

PROCEDURAL HISTORY

Grievant was a policy review specialist for the Department of Behavioral Health and Development Services ("the Agency"). On March 11, 2020, the Grievant was charged with a Group I Written Notice of discipline and a Group II Written Notice with job termination. Citing a prior active Group II Written Notice, the termination was based on accumulation of discipline.

On March 16, 2020, Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. The Grievant already had a pending grievance, filed March 5, 2020. The Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") found that consolidation of the March 5 and March 16 grievances was appropriate. The March 16 dismissal grievance challenged the agency's March 11 disciplinary actions, which were a subject of the February 28 meeting and which ultimately resulted in termination of the Grievant's employment. Among other things, the grievant challenged those disciplinary actions on grounds that they perpetuated a pattern of racial discrimination and retaliation against her, which the agency, the Grievant alleges, had failed to investigate and resolve despite the Grievant's previous complaints. Likewise, the March 5 grievance challenged the agency's alleged history of racial discrimination and retaliation, to include the February 28 meeting and the disciplinary actions discussed there. The March 5 grievance was presented as a "response to the February 28, 2020 notice of intent [to] take formal disciplinary action," and it requested reinstatement to a work environment free from racial hostility. The Grievant is African American.

On April 29, 2020, the Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") appointed the Hearing Officer for these consolidated grievances. During the pre-hearing conference, the grievance hearing was scheduled for June 24, 2020, on which date the grievance hearing was held, 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
Advocate for Grievant
Representative for Agency
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through her grievance filings, the Grievant requested rescission of the Written Notices, reinstatement to an environment free from racial discrimination and/or retaliation, and back pay.

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 his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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. Regarding the claim of discrimination, hostile or retaliatory work environment, the Grievant will bear the burden of proof.

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.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group Offenses and permissible discipline, including termination. Agency Exh. 5.

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 disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offenses

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

The Agency employed Grievant as a policy review specialist, with several years of tenure. She has a prior, active Group II Written Notice from 2017, issued by a prior supervisor. Agency Exh. 4.

The Group I Written Notice issued March 11, 2020, for the Grievant charged unsatisfactory performance:

> On September 25, 2019, [Grievant] received a Notice of Improvement Needed/Substandard Performance because she failed to comply with the job requirement to respond to revision packets and final manuals within 30 days of receipt and failed to pull and review the required number of new applications from the applicant waitlist on multiple occasions. On November 6, 2019, [Grievant] received a copy of her Performance Evaluation. She received an overall rating of Below Contributor due to her continued failure to maintain timeliness in reviewing procedures and completing the review process. Since that time, [Grievant] has failed to respond to revisions and final manuals within the required 30 calendar days over 20 times.

Agency Exh 3. As for circumstances considered, the Written Notice, in Section IV, stated:

> A review of [Grievant's] response to the Notice of Intent to Take Formal Disciplinary Action and her employment history fail to justify mitigation. {Grievant] received a Notice of Improvement Needed on September 25, 2019, and received an overall rating of Below Contributor on her Performance Evaluation on November 6, 2019. She currently has an active Group II Written Notice dated September 2017. During her due process meeting on February 28, 2020, [Grievant] was insubordinate and failed to follow repeated supervisory instructions to turn in her office ID badge and keys, stop typing on her computer, and stop re-arranging files on her desk. [Grievant's] supervisor and the Department's Employee Relations Manager had to instruct to turn in her office ID badge and keys over a dozen times before she finally did so, and [Grievant] stated multiple times that she would not leave unless she could call DHRM during the meeting. Because of [Grievant's] failure to cooperate and follow instructions, the process lasted well over 1 ½ hours.

The Group II Written Notice issued March 11, 2020, for the Grievant charged failure to follow instructions and/or policy:

> Repeated failure to follow supervisor's instructions regarding contacting supervisor directly to advise of unscheduled absences or tardiness; meeting requests/calendar entries; providing final provider packages to support staff; pulling information from OLIS; refraining from exhibiting unprofessional behavior and disruptive behavior. See attached Notice of Intent to Take Formal Disciplinary Action for details.

Agency Exh 2. As for circumstances considered, the Written Notice, in Section IV, repeated the circumstances considered for the Group I Written Notice. The attached letter (Notice of Intent to Take Formal Disciplinary Action), dated February 28, 2020, from her direct supervisor, included more details, such as:

> You also have failed to follow my instructions on several occasions. On October 10, 2019, I instructed you to contact me directly if you would be out of the office or tardy without prior approval. Your approved work hours are from 8:00 am-4:30 p.m. Monday – Friday. On October 1st you called in late to the administrative support staff instead of contacting me via phone or email. On October 10th you called in absent to the administrative support staff instead of contacting me via phone or email. On January 13, 2020, and January 15, 2020, you again arrived late without contacting me to notify me you would be late for work.
>
> There have been several occasions when I, as your supervisor, attempted to schedule meetings with you and you declined the meeting when you did not have any specific appointment on your calendar. When this occurred the first time, I informed you that I did not have access to the details of your calendar and asked you to grant me immediate access to your calendar. At the same time, I viewed your calendar from someone else's computer who had access and noted that you were blocking off full days, almost every day to review applications. We discussed the purpose of blocking is only for meetings or if leave has been approved and I instructed you not to block large periods of time for your routine job duties. I further stated that anytime you were not in scheduled meetings with applicants or on leave or taking a scheduled break, that your calendar should reflect that you are available and able to meet with your supervisor. On October 28th, I provided you with another request for access to your calendar. On November 4, 2019, for the 3rd time, I asked that you please go through your calendar and remove all appointments where you have scheduled policy and procedure review, which makes your schedule look blocked when it is free.

Further, the supervisor wrote:

> I have delayed taking any disciplinary action for your continued failure to act professionally and failure to follow my instructions, in the hopes of seeing some improvement in your behavior; however, this unacceptable behavior has continued and I see no sign of improvement. Therefore, I can no longer delay addressing this pattern of behavior and I intend to give you a Group II Written Notice pursuant to the Standards of Conduct due to your repeated and continued failure to follow multiple instructions I have given you. Although these instances of your failure to follow my instructions and unacceptable behavior could result in multiple Group II Written Notices, I have decided to combine these events into a single Group II Written Notice for your ongoing failure to follow my instructions regarding my expectations for your workplace conduct.

The Agency's witnesses credibly testified consistently with the charges and circumstances described in the Written Notices and the Grievant either confirmed or did not challenge the essential facts. The supervisor (the department Director) who issued the Written Notices became the Grievant's direct supervisor because her prior supervisor became afraid of the Grievant's aggressive behavior and response to supervision. She testified exhaustively regarding the circumstances leading to the issuance of the two Written Notices, and she was, likewise, cross-examined exhaustively.

The Agency's EEO/ER manager and the Grievant's direct supervisor were present at the September 19, 2019, Notice of Improvement Needed meeting. Also present at the meeting were the claimant's then-supervisor and the HR manager. The Grievant's direct supervisor, the EEO/ER manager, and the HR manager testified to the Grievant's inappropriate conduct that led to the change of the Grievant's direct supervisor. The then-supervisor provided three pages of typed notes of the meeting. Agency Exh. 9, pp. 5-7. The witnesses present at the meeting testified that the Grievant exhibited aggressive and threatening behavior, to the point that the HR manager, a black male with a long tenure in human relations management, was afraid of what the Grievant might do. This evidence went uncontroverted. The HR manager testified that in his

decades long career in human resources, including the Army, he never observed anyone respond in such an aggressive manner when receiving a disciplinary action. The Grievant's then-supervisor elected not to supervise directly the Grievant after this interaction. The department director took over direct supervision as of September 25, 2019.

The Grievant's annual performance evaluation of November 6, 2019, resulted in an overall below contributor rating. Agency Exh. 13. Ultimately, the Grievant's supervisor notified the Grievant of an intent to issue discipline. At the February 28, 2020, meeting to discuss the Agency's concerns and disciplinary intention, the Grievant was informed of administrative suspension pending the Agency's disciplinary determination. At the February 28 meeting, the Grievant became so disruptive and noncompliant that the supervisor and the EEO Director were on the verge of calling police enforcement to intervene.

The Grievant testified that the Agency's management has degraded during her tenure, creating for her a hostile environment. The Agency, she asserted, did not heed her claims of a hostile environment and did not investigate her accusations. The Grievant testified that the Agency was more professional when she was hired. The associate director at the time provided a recommendation letter for the Grievant. Grievant Exh. 1. The Grievant's experience at the Agency changed after she challenged her pay level under a prior supervisor. The Grievant challenged her supervisors and the Agency regarding her perceptions of poor management, poor supervision, and retaliation against her. The Grievant testified that her conduct has been mischaracterized and that her supervisors do not understand her as a black woman; she was not part of the clique; and that the discipline against her is retaliatory. The Grievant also sought medical attention for her work anxiety. Grievant Exh. 2.

A former employee of the department testified on the Grievant's behalf, and she testified that she believed the department and Agency were not managed well, that there was improper fraternization and cronyism, creating a hostile work environment, all leading her to leave in January 2019 for other career opportunities. She testified that in her opinion the Grievant was very professional, while supervisors were not.

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. 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; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

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. The evidence preponderates in showing that the Grievant did not carry out her duties and assignments described in the Written Notices. Such behavior violated the applicable expectations and instructions of her supervisor. Under the Standards of Conduct, unsatisfactory work performance is a typical Group I offense; failure to follow supervisor's instructions is normally a Group II offense. Agency Exh. 5. Based on the evidence presented, I

conclude that the Agency has met its burden of proof of the offenses and level of discipline—Group I and Group II, with termination.

Discrimination and Retaliation

On or about March 5, 2020, the grievant filed a grievance broadly asserting a racially hostile work environment and retaliation by members of Agency management, with a timeline of allegations beginning in 2016 and including the meeting on February 28, 2020. I consider the subsequent formal discipline and termination within the Grievant's allegations.

To establish a *prima facie* case of race discrimination, a plaintiff must demonstrate (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class. *See Goode v. Cent Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619, 626 (4th Cir. 2015); *Freeman v. N. State Bank*, 282 Fed. Appx. 211, 216 (4th Cir. 2008).

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

The Grievant passionately asserts racial and retaliatory animus as motivating the Agency's discipline. She also complains that the Agency did not launch investigations for her voiced concerns over retaliation and discrimination (which includes different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin or sex). The GPM, at §§ 1.5 and 1.6, provides procedures for retaliation and discrimination investigations, although a grievant may use either the investigation route or the grievance procedure, but not both. See also DHRM Policy 2.30. Grievant Exh. 25. The Grievant has elected to pursue the grievance procedure to advance her claims.

The Grievant engaged in protected activity by expressing her responsive views to the Agency regarding her job performance and questioning her pay level. The Grievant asserts that the discipline she has experienced stems from retaliation for her frank and sharp expressions to the Agency. The Agency's discipline and termination certainly is a materially adverse action. However, the Grievant does not satisfy the burden of proof of showing that the Agency's assessment of the Grievant's work performance, attendance, and compliance with supervisor's

instructions was retaliatory or discriminatory. There is no evidence of disparate treatment of the Grievant—other employees exhibiting similar deficiencies without consequence, for example.

The Agency has addressed a noticeable performance and compliance deficiency. Grievant has not presented sufficient evidence to show that the Agency's evaluation of the Grievant's performance and behavior was motivated by improper factors. Rather, the Agency's assessment of poor performance, poor attendance, and failure to comply with instruction all appear based on the Grievant's actual conduct and behavior, all of which was solely within the control of the Grievant.

For lack of sufficient evidence, Grievant's claims of race discrimination and retaliation fail. The Grievant's conclusory assertion that all of her supervisors throughout her tenure acted with racial animus is supported only by speculation and conjecture. Some of the supervisors involved were identified as African American. She does not show any facts that plausibly suggest that her most recent supervisor's decision to discipline and terminate was mere pretext and motivated by race or retaliation.

Mitigation

The Agency had leeway to impose discipline along the continuum less than termination. However, the Agency expressed its inability to mitigate the discipline to less than termination because of the prior Group II Written Notice, accumulation of discipline, and the Grievant's behavior when placed on administrative leave on February 28, 2020. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

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 the Office of Employment Dispute Resolution." 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.

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 for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding its provision of services. The hearing officer accepts, recognizes, and upholds the Agency's important role in protecting and serving the public in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable policies and standards of conduct provide stringent expectations of facility staff. Termination is the normal disciplinary action for accumulation of two Group II offenses, and more, unless mitigation weighs in favor of a reduction of discipline. There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that termination was its only option.

DECISION

For the reasons stated herein, there is no basis for me to reverse the Agency's Group I and Group II Written Notices, with termination. Further, there is no basis for me to uphold the Grievant's grievance alleging discrimination and retaliation. Accordingly, the Agency's Group I and Group II Written Notices, with termination, are upheld.

APPEAL RIGHTS

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

Please address your request to:

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

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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

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

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

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

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