

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11687

Hearing Officer Appointment: April 7, 2021
Hearing Dates: September 15-16, 2021
Decision Issued: October 4, 2021

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently a Senior Investigator at the Office of the State Inspector General (the "OSIG" or the "Agency"). The Grievant requested an administrative due process hearing to challenge the issuance of 8 Group II Written Notices, each issued on March 22, 2021 (with termination due to the accumulation of Written Notices, effective March 22, 2021), by management of the OSIG, as described in the Grievance Form A dated March 31, 2021.

In her Grievance Form A, the Grievant challenges the discipline seeking reinstatement, restoration of back pay and benefits and attorney's fees. In the alternative, the Grievant asks for mitigation of the discipline.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

The parties held 6 prehearing conference calls and the hearing was held over 2 days, September 15-16, 2021. Additionally, on July 27, 2021, the Office of Employment Dispute Resolution (“EDR”) issued its related Compliance Rulings, EDR Ruling Nos. 2021-5285 and 2021-5286.

At the hearing, the Grievant was represented by an attorney and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-93 in the Agency’s exhibit binder and exhibits 1-20 from the Grievant.¹

Pursuant to the Third Amended Scheduling Order entered August 10, 2021 (the “SO”), the hearing was held virtually. The hearing officer recorded the hearing, and a court reporter was also present.

The hearing officer and the parties accepted EDR’s delineation of the issues for EDR’s Compliance Rulings as also the issues for hearing:

- (1) The Grievant’s termination resulting from eight Written Notices
- (2) The Grievant’s claim that the Agency retaliated against her for alleged whistleblowing activities. In this regard, as EDR notes, the only protected activity identified in the grievance paperwork is the Grievant’s alleged March 3, 2021, notification to certain leaders of the General Assembly.

SO, at 9.

¹ References to the agency’s exhibits will be designated AE followed by the exhibit number. References to the Grievant’s exhibits are designated GE followed by the exhibit number.

APPEARANCES

Representative for Agency
Grievant
Legal Counsel
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Senior Investigator.
2. The Grievant was hired by OSIG in January 2020.
3. The Office of the State Inspector General, on behalf of the citizens of the Commonwealth, serves as a catalyst for positive change by facilitating good stewardship of resources; deterring fraud, waste, abuse and corruption; advocating efficiency and effectiveness; and promoting integrity and ethical conduct. AE 16.
4. The Grievant was hired as one of the individuals responsible for administering the State Fraud, Waste and Abuse Hotline.
5. In this position her core work responsibilities included:
 - Prepares complaint summaries to document allegations; notates sufficient details, as illustrated in the State Fraud, Waste, and Abuse Hotline Policies and Procedures Manual.

- Documents citizen concerns or complaints in accurate and thorough summaries. Summaries are clear, concise and written in language that is easy to understand.
- Completes Hotline case write-ups within two business days of receipt.
- "Screens out" applicable Hotline calls, concerns or complaints in accordance with established Hotline procedures.
- Follows up with Hotline callers as required to obtain additional details, when requested by auditors/investigators.
- Inputs new Hotline case records into the database as needed.

AE 16.

6. In her EWP, signed by the Grievant on November 16, 2020, the Grievant agreed to comply with OSIG's Code of Ethics and to "[demonstrate] a commitment to being a trustworthy steward of assigned resources. Acts with integrity and truthfulness in the performance of duties. Uses role solely for the public good versus private gain. Abides by all applicable laws, regulations, and policies." AE

16.

7. On the signature page of her EWP, the Grievant acknowledged a Confidentiality Statement:

I acknowledge and understand that I may have access to confidential information regarding employees and/or customers. In addition, I acknowledge and understand that I may have access to proprietary or other confidential information business information belonging to the **Office of the State Inspector General**. Therefore, except as required by law, I agree that I will not:

- Access data that is unrelated to my job duties at **Office of the State Inspector General**.
- Disclose to any other person, or allow any other person access to, any information related to **Office of the State Inspector General** that is proprietary or confidential and/or pertains to employees and/or customers. Disclosure of information includes, but is not limited to, verbal discussions, FAX transmissions, electronic mail messages, voice mail communication, written documentation, "loaning" computer access codes, and/or another transmission or sharing of data.

I understand that **Office of the State Inspector General** and its employees and/or customers, staff or others may suffer irreparable harm by disclosure of proprietary or confidential information and that **Office of the State Inspector General** may seek legal remedies available to it should such disclosure occur. Further, I understand that violations of this agreement may result in disciplinary action, up to and including, my termination of employment.

AE 16.

8. The Agency is less than 10 years old. Accordingly, OSIG stresses to its employees the indispensable values of integrity, trust, honesty and confidentiality.

These values are paramount as OSIG as it seeks to engender trust and confidence in the public and in the other executive agencies within the Commonwealth over which it has oversight. AE 87.

9. OSIG Policy 1001.1 provides concerning Confidentiality and Security:

Policy 1001.1: Confidentiality and Security

Confidentiality

All Hotline investigations and inclusive documents require strict adherence to confidentiality standards.

- Hotline cases should not be discussed except by the IAD, OSIG-authorized personnel or others included on a "need-to-know" basis.
- Hotline Investigative/Complaint Report sheets shall not be shared, except among individuals conducting the investigation.
- The State Inspector General or designee is authorized to distribute or release Hotline reports.
- All documents, working papers, notes and reports dealing with an investigation shall be marked "Confidential State Fraud, Waste and Abuse Hotline Document."
- Interviews and investigation information should not be shared, discussed or given to anyone who does not have a legitimate need for access.
- Strict confidentiality must be maintained throughout the entire Hotline investigation.

Physical Security

All Hotline documents must be maintained in a secured environment. All custodians of Hotline documents, such as IADs and OSIG staff shall maintain all information supporting Hotline investigations in a secured location. All such information, documentation, etc. is the property of OSIG and shall be identified as such. OSIG may request that supporting information and documentation accompany formal reports.

Written Communications

- Hotline reports and other sensitive documents should be transmitted electronically between OSIG and state agencies that possess digital encryption capabilities, or agreed upon password protected documents.

- Commonwealth inter-agency mail should never be used to send Hotline information/ documents.
- Fax communications and correspondence via the United State Postal Service (USPS) are permitted under certain circumstances only after prior discussion with OSIG.

AE 12.

10. The Grievant received substantial training concerning her confidentiality and security obligations to the Agency and, in any event, admitted that she understood these responsibilities because of her past employment and background.
11. In February 2021, Grievant disclosed highly confidential OSIG investigative materials to a third party, who in turn provided the confidential materials to the news media.
12. Grievant conceded she was ultimately responsible for the improper disclosure of confidential OSIG investigative materials to the news media, and that her conduct violated OSIG and Commonwealth policies.
13. On or about February 23, 2021, the materials were widely publicized by the news media. This prohibited disclosure damaged the reputation of OSIG and continues to materially, adversely impact the Agency's ability to conduct confidential investigations.
14. On February 24, 2021, OSIG leadership discussed the need for an internal administrative investigation into the significant information security issues raised by the unauthorized dissemination of confidential investigative Agency documents.

15. At this time, management had no idea who was responsible for the leaks.
16. Shortly thereafter, OSIG referred the investigation to the Virginia State Police (“VSP”) because the Agency could not identify a suspect or person of interest in relation to the disclosure to the news media and because the perpetrator could conceivably be in management.
17. On March 3, 2021, Grievant’s attorney at that time, [REDACTED] transmitted correspondence to leadership in the General Assembly, which, in relevant part, alleged that [REDACTED] represented an unidentified employee of the Commonwealth who sought to invoke protections under the Virginia Fraud and Abuse Whistle Blower Protection Act (“WBPA”), codified at Virginia Code §§ 2.2-3009, *et seq.* On October 1, 2021, both parties submitted briefs to the hearing officer concerning the application of the WBPA in this case.
18. [REDACTED] correspondence included various internal drafts and investigative materials from the Agency that are highly confidential and concerned completed and ongoing OSIG investigations.
19. Neither the letter transmitted by [REDACTED] nor the evidence presented at the Grievance Hearing identify any alleged “wrongdoing” or “abuse” within the scope of the WBPA. It is noteworthy that the evidentiary standard under the WBPA is the “clear and convincing” standard.
20. On or about March 5, 2021, OSIG reviewed the materials transmitted to the General Assembly and gathered evidence suggesting that Grievant had improperly disseminated the confidential information obtained by [REDACTED]

21. OSIG representatives convincingly testified that (1) Grievant's communication to the General Assembly did not include any allegation of whistle blower "wrongdoing" or "abuse" under the WBPA and (2) the disclosure of numerous confidential draft investigative documents was unnecessary and in violation of OSIG and Commonwealth policy.
22. Having identified Grievant as a possible suspect in the disclosure of confidential investigative materials to the news media that occurred only one week earlier, OSIG resumed its administrative investigation to identify whether Grievant violated policy by disseminating confidential OSIG investigative materials and information.
23. In the course of its administrative investigation, OSIG confirmed that Grievant violated Agency policy by transmitting highly sensitive investigative materials, including medical information and other personal identifying information ("PII") from the Department of Correction's CORIS system, to her personal email account on at least twenty-five (25) occasions.
24. Grievant's transmission of this information to her personal email account violated numerous OSIG and Commonwealth policies related to the handling of OSIG investigative and work materials which are confidential.
25. On March 22, 2021, the Grievant was issued eight Group II Written Notices and terminated from employment with the agency for these policy violations.
26. The misconduct cited in each Written Notice is the same: "confidential information was transmitted from your agency email account to your personal Gmail account which is in violation of state and agency policies."

27. Each of the eight Written Notices identifies certain offense dates, which represent the dates on which the Grievant transmitted confidential information to her personal email account.
28. Each Written Notice also correctly identifies one state policy and four agency policies violated by the grievant based on her conduct.
29. The Grievant's personal Gmail account was not a secure environment.
30. The COVID-19 pandemic hit in March 2020 and while Agency employees were encouraged to telework, confidentiality and security obligations continued. Certain narrow dispensations were afforded employees, such as the accommodation to hook up a personal printer or monitor to their state computer. AE 23. None applied to the unsecure transmission of confidential information from work to personal email accounts.
31. While employees were encouraged to telework, the OSIG office remained open and accessible to employees during the Period.
32. At first, OSIG management were going to write 25 Group II Written Notices, but subsequently decided to group the offenses by month of commission, thereby reducing the number to 8. This was a valid exercise of management's discretion to mitigate and well within its prerogative.
33. **It is axiomatic that only the offenses cited in the Written Notices are to be considered by the hearing officer concerning this case. Accordingly, for discipline purposes, the hearing officer limits his consideration to the transmission of the confidential information (AE 27-83) to Grievant's personal Gmail account, as cited in the Written Notice. The other admitted**

violations of confidentiality and security committed by the Grievant are provided for context in this Decision but were otherwise not factored into the hearing officer's decision to uphold the discipline administered by management.

34. Concerning the confidential information transmitted by the Grievant to her personal Gmail account, the Grievant stipulated:
 - (a) the emails and attachments (AE 27-83) were authentic;
 - (b) they were sent to her personal email account by Grievant; and
 - (c) they contained information which would be considered confidential from the perspective of OSIG.
35. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
36. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
37. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
38. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.
39. Grievant's purported whistle blower report was not made in "good faith" because it was intended to protect her from discipline for her earlier policy violations. Over the Agency's objections, the hearing officer admitted various media reports

for limited purposes such as to show context or motive. One of these, a Richmond-Times Dispatch article of March 8, 2021, provides in part: “Fearing for her job security, [Grievant] alleges, she released some of her records to General Assembly leaders last Wednesday under a state whistleblower law.”
GE 14.

40. Additionally, [REDACTED] communication involved information and materials related to completed and ongoing investigations conducted by OSIG, which is the Agency charged with investigating allegations under the WBPA. As such, any purported “wrongdoing” or “abuse” identified in the draft reports had already been (or was being) considered by OSIG. This emphasizes the lack of justification for Grievant’s disclosure of the information to the news media and the transmission of the same to the General Assembly.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). AE 9. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

The Grievant did not follow state and agency policies concerning the use of state computer equipment and the disclosure of confidential information.

Specifically, DHRM Policy 1.75-Use of Electronic Communications and Social Media states that accessing, uploading, downloading, transmitting, printing, communicating, or posting access- restricted agency information, proprietary agency information, sensitive state data or

records, or copyrighted materials in violation of agency or state policy is prohibited, as well as any other activities designated as prohibited by the agency (OSIG Policy 113 - Standards of Ethics and Conflict of Interest, OSIG Policy 121 - Code of Ethics, OSIG Policy 300-Information Security Policy, OSIG Policy 313 - Information Resource Acceptable Use Policy).

The Grievant's disciplinary infractions were reasonably classified by management as Group II offenses. Failure to follow policy is listed in the SOC as a Group II offense and a second Group II "normally results in discharge." AE 92.

The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the Agency's attorney that the various offenses are appropriately classified at the Group II level with the Agency appropriately exercising the discipline and ending the Grievant's employment due to accumulation of several Group II Written Notices.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations rose to the level of Group II offenses.

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 Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *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." *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the demands of the Grievant's work environment;
2. the Grievant's good job performance and evaluation; and
3. the effect of the COVID-19 pandemic;

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the policy is important to the proper functioning, appearance and reputation of the Agency, and the Grievant held a position of trust where management of necessity relied on her handling confidential information in strict conformity with Agency policies, as she had undertaken to do. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

Id.

In this proceeding, the 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.

The hearing officer decides for the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

The Grievant claims that the Agency retaliated against her for alleged whistleblowing activities. The only protected activity identified in the grievance paperwork is the Grievant's alleged March 3, 2021 notification to certain leaders of the General Assembly. Grievant's claim of whistle blower protection is based on that single alleged protected activity. For the reasons provided above, the hearing officer finds that the Grievant does not qualify as a whistle blower under the WBPA.

A claim of retaliation generally requires the Grievant to present evidence that (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.

Even if the Grievant were able to prove she engaged in a protected activity, the evidence in no way establishes the required causal link – the Agency's alarm bells regarding security and the concomitant investigation preceded any notification to the General Assembly. For these reasons and the reasons provided in the Agency's brief, the Grievant's affirmative defense of retaliation fails.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's

action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 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.^[1]

ENTER 10/4/2021



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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