

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 11734

Hearing Officer Appointment: September 7, 2021

Hearing Date: October 26, 2021

Decision Issued: November 9, 2021

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently an Office Manager in Customer Records in the Department of Motor Vehicles (“DMV” or the “Department” or the “Agency”). The Grievant requested an administrative due process hearing to challenge the issuance of a Written Notice issued July 16, 2021, by the Department. The single Written Notice consists of 3 Group II offenses for failure to follow instructions/policy and one Group III offense for lack of candor. Pursuant to the Written Notice, the Grievant’s employment was terminated July 16, 2021.

The Grievant has raised the issues specified in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including removal of the Written Notice from her record, reinstatement, back pay, restoration of 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 Grievant, the Grievant's attorney, the Agency's attorney and the hearing officer participated in 2 prehearing conference calls at 11:00 am on September 14, 2021, and at 10:00 am on October 8, 2021.

Pursuant to the Amended Scheduling Order entered October 11, 2021 (the "SO"), the hearing was held in person at DMV, with some witnesses appearing virtually. The hearing officer recorded the hearing.

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 1-37 in the Agency's exhibit binder and exhibits 1-62 from the Grievant.<sup>1</sup>

#### APPEARANCES

Representative for Agency  
Grievant  
Legal Counsel  
Witnesses

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<sup>1</sup> 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.

### FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as an Office Manager in Customer Records in the Data Management Services division of DMV. AE 6.
2. The Grievant was hired by DMV on May 4, 2011.
3. The Grievant became the Customer Records Office Manager in 2019. AE 6.
4. As the Office Manager in charge of Customer Records, the Grievant was held to a higher standard than employees who do not hold a management position.
5. As the Manager, the Grievant was in a position of leadership and was expected to lead by example. Managers are expected to support the Agency's vision and mission, including its emphasis on strong customer service.
6. Managers must themselves set an example to those under their supervision to ensure that all Agency policies, guidelines, practices and rules are followed.
7. The Grievant's Employee Work Profile (EWP) stresses that the Grievant was required to maintain the Agency's official customer records in compliance with federal and state statutes as well as agency policies and procedures and to ensure that requests for information were released timely and that data submitted was technically accurate, complete and submitted and reported as scheduled. AE 7.

8. The Grievant was required to take action as needed to prevent and/or resolve production backlogs and to provide production reports that were accurate and timely. The law generally requires DMV to provide responses to requestors of data within 5 business days.
9. Va. Code § 2.2-3704 (B) provides in part:

“A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases **within five working days of receiving a request**, provide the requested records to the requester or make one of the following responses in writing: ...” (Emphasis supplied)
10. The Grievant received significant training concerning her management position and the Grievant stated that the manner in which work was reported had not been changed since she started her tenure as office manager.
11. Accordingly, work should have been stamped in and accounted for within one business day. Any backlogs should have been accurately and clearly reported and senior management and executive officers immediately alerted, so that the situation could be remedied through authorization of overtime resources, reallocation of staff, etc.
12. In fact, this is precisely what happened on November 10, 2020, when the Grievant realized that the office had a backlog of 3,207 requests. The Grievant followed

instructions and the applicable protocols to request assistance, assistance was provided, and the backlog was resolved.

13. On approximately December 1, 2020, one of Grievant's work leads, ■■■, retired. ■■■ was replaced by ■■■ ■■■ duties had included stamping in and counting customer requests. On November 5, 2020, the Grievant sent an email to the staff under her supervision explaining how ■■■ duties would be distributed.
14. Notably, in this email, the Grievant stressed, "**Any incoming LexisNexis will need to be put to the side for me. I will sort, count, and scan the requests to the teleworking staff.**" (Emphasis in original).
15. While the Grievant continues to blame ■■■ for her shortcomings, it is uncontroverted that at the relevant time, ■■■ did not know how to scan and of course, the Grievant's email specifying her own responsibility concerning LexisNexis requests (never countermanded in writing) is highly probative.
16. LexisNexis is a business that provides information to insurance companies. Requests from LexisNexis usually arrive in large envelopes. Per past practice, instructions and policy, these envelopes are opened and each page is date stamped. In the early part of 2021, the Grievant stopped stamping the arrival date of the requests from LexisNexis, as required. When the requests stopped being date stamped, the turnaround time for the LexisNexis requests could not be tracked. A backlog of approximately 10,017 LexisNexis requests dating back to February ensued.
17. As stated above, requests for crash reports should be processed and responded to within five business days. Additionally, there were checks payable to the Agency

associated with each LexisNexis request that were being held with the backlog in the work center.

18. Accordingly, the Grievant failed to follow policy and perform the work that she stated in her email of November 5, 2021, that she would do. Grievant failed to reassign this responsibility to any other employee. Grievant failed to stamp, count and scan all LexisNexis requests within one business day and failed to ensure LexisNexis requests were timely processed. This failure to follow instructions and policy resulted in a backlog of over 10,000 requests from LexisNexis, which severely impacted Agency operations. The hearing officer agrees with counsel for the Agency that the Grievant's disciplinary infractions warrant the Group II Written Notice.
19. Concerning the Second Group II Written Notice, Grievant's duties included maintaining accurate and timely statistical data related to work center activities and providing upper management and top executives with reports.
20. Grievant was also required to review reports submitted by subordinates to ensure data was technically accurate, complete and submitted as scheduled.
21. There were LexisNexis requests that were not opened, date stamped or entered into the notebook. Without having been stamped and counted, the volume of LexisNexis requests was not properly entered into the notebook or accounted for on weekly management reports or on the intranet dashboard, relied upon by the top Agency executives. These LexisNexis requests had been set aside for Grievant as Grievant had directed, and these requests began to pile up. The result was a

backlog of over 10,000 LexisNexis requests, of which senior management and top executives were for a long period totally unaware.

22. The reports Grievant provided were inaccurate and unreliable, and they severely impacted Agency operations. As the Office Manager, Grievant was required, per instructions and policy, to provide production reports that were accurate and timely. The hearing officer agrees with counsel for the Agency that such infractions warrant a second Group II Written Notice.
23. Grievant had ample opportunity to notify management that a backlog existed, as she had done in the past.
24. Indeed, Grievant did not notify management of the backlog and made no request for assistance even though the backlog was becoming more severe on a daily basis and even though LexisNexis management had contacted Grievant to discuss the difficulty they were experiencing with DMV's untimely responses.
25. Grievant's EWP specifies that Grievant is to plan the organization of work and assignments to improve work flow and to achieve efficient and economical operations within established guidelines and procedures. AE 7 at 3. The Grievant is required to take action "as needed to prevent and/or resolve production backlogs." *Id.* Despite LexisNexis' intervention, Grievant failed to report the backlog or to remedy it.
26. The Agency only became aware of the problem when, on June 8, 2021 (AE 19), LexisNexis contacted the DMV Commissioner directly, who rightly was livid when he discovered the nature and severity of the problem.

27. Grievant's failure to report this matter to her management is appropriately classified as a third Group II offense, having severely impacted Agency operations.
28. Concerning the Group III offense, the weekly production reports Grievant provided during the Period had shown no backlog, and Grievant was reporting no backlog to management. AE 18.
29. The electronic dashboard that the Agency created to monitor backlogs and turnaround time showed no backlog at all and a typical turnaround time of within 3 business days.
30. On Tuesday, June 8, 2021, prompted by the Commissioner's queries following LexisNexis reaching out to him, the Grievant had two phone conversations with her Director regarding this matter.
31. On both occasions the Grievant stated there was no backlog. The Grievant attributed LexisNexis' complaint to peripheral factors, such as the way in which LexisNexis was counting their backlog and delays in the US Mail.
32. After the Director drafted a response to the Commissioner based upon the Grievant's explanations, the Director decided not to send the response because a cryptic email from the Grievant (AE 21), amongst other things, did not make sense.
33. The Director called a meeting for the next morning. In attendance were the Grievant, ■■■, the Deputy Director and the Director. At this meeting, the Grievant essentially admitted that there were LexisNexis requests backlogged in cabinets that had not been counted and not reported. Many were in envelopes and



unopened. There were requests from February, March, April, May and June which had not been counted.

34. The hearing officer agrees with the Director that the Grievant knew of the backlog, knew that the requests should have been counted and reported, and that the Grievant was not candid when discussing the matter with the Director. Accordingly, the offense is appropriately classified by management as a Group III offense.
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. The only person whom the Grievant alleges had any racially discriminatory animus is the Deputy Director but the Deputy Director's responsibility was relatively minor and secondary to that of the Deputy Commissioner (herself black), the Director and the Human Resources Employee Relations Manager, all three of whom were primarily responsible for the discipline administered.

Accordingly, the Grievant has failed to carry her burden concerning her affirmative offense.

#### 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's disciplinary infractions were reasonably classified by management as 3 Group II offenses and a Group III offense. Failure to follow instructions and/or policy is listed in the SOC as a Group II offense and a second Group II “normally results in discharge.” AE 3. Similarly, lack of candor as exhibited here by Grievant, which undermined her position, the Agency core values and severely impacted the Agency’s activities, is appropriately classified by management as a Group III offense.

The Agency's core values are:

- **Trustworthiness:** Inspiring the confidence of others through our reliability, dependability and honesty
- **Respect:** Creating an inclusive work place and recognizing and appreciating the value and importance of other individuals and the agency
- **Accountability:** Taking ownership for our actions and decisions
- **Integrity:** Always doing the right thing
- **Teamwork:** Working together to achieve common goals and understanding what belonging feels like for your team.

The hearing officer agrees with the Agency that the Grievant's failure to accept any measure of accountability in this case and to recognize responsibility for her shortcomings has essentially undermined her position, and DMV's core values, and the trust and confidence that DMV has a right to expect from every employee, especially those who are in leadership positions.

EDR has consistently held supervisors, such as Grievant in this case, to a higher standard. As EDR stated in case No. 9872, in evaluating misconduct by a supervisor that to a non-supervisory employee would have been a Group I, the discipline was increased to a Group II, stating, "This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision." *See, also*, DHRM Ruling 2015-3953:

The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue. As discussed above, the Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy. DHRM has previously determined that "agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees." The *Rules for Conducting Grievance Hearings* require that a hearing officer must show deference to how the agency weighs the supervisory status of an employee in determining the appropriate level of discipline. Here, the agency appears to have determined that the grievant's misconduct was more severe based, in part, on his position as a supervisor. Because policy permits an agency to hold supervisory employees to a higher standard than non-supervisory employees, the hearing officer did not err in deferring to the agency's weighing of that factor. We decline to disturb the decision on this basis. [Footnotes omitted].

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 first 3 enumerated 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. Similarly, termination is also warranted under the enumerated Group III offense.

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 and the enumerated Group III offense.

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 (4<sup>th</sup> Cir. 1988).

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past exemplary 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 job and work environment;
2. the Grievant's exemplary job performance leading up to the discipline and stellar evaluations;
3. the effect of the COVID-19 pandemic;
4. the delays in the US Mail;
5. the resignation of ■■■; and
6. the length of the Grievant's service to the Agency.

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 to perform her duties in strict conformity with Agency policies, as she had been trained and 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 (4<sup>th</sup> 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.

#### 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.

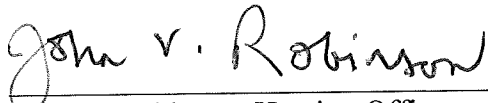
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to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

ENTER 11/ 9/ 2021



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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).

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