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 No. 11712

Hearing Date: July 26, 2021
Decision Issued: August 2, 2021

PROCEDURAL HISTORY

On May 24, 2021, Grievant was issued two Group II Written Notices of disciplinary action and terminated from employment. Each Written Notice was for a violation of DHRM Policy 2.35, Civility in the Workplace.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 10, 2021, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On July 26, 2021, a hearing was held in person 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
Agency Representative
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?

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 her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

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.

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 action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. 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."

Policy 1.60, Standards of Conduct, provides that 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. Agency Exh. 4

A Group II offense includes acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. A single Group II Written Notice may include suspension of up to 10 workdays. A second Group II offense normally results in discharge. Agency Exh. 4.

DHRM Policy 2.35 provides:

> Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.
>
> . . .
>
> The Commonwealth will not tolerate any form of retaliation directed against an employee or third party who, in good faith, either reports these prohibited behaviors or participates in any investigation concerning such behaviors.
>
> . . .
>
> Managers and/or supervisors who fail to take appropriate action upon becoming aware of the behavior shall be subject to disciplinary action, up to and including termination, under Policy 1.60, Standards of Conduct.

Agency Exh. 5. According to the policy, a "reasonable person" standard is applied when assessing if behaviors should be considered offensive or inappropriate.

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 the Grievant as a director, a senior leadership position, reporting to the deputy commissioner. A Notice of Improvement Needed was issued to the Grievant on

November 2, 2020. The notice detailed four complaints regarding the Grievant's abrasive and unprofessional interactions with staff. Agency Exh. 10.

The Group II Written Notice, issued by the deputy commissioner on May 24, 2021, detailed the facts of the offense, and concluded, that on February 23, 2021, the Grievant created a toxic environment in the meeting, a violation of Policy 2.35, Civility in the Workplace. Agency Exh. 2.

The second Group II Written Notice, issued by the deputy commissioner on May 24, 2021, detailed the facts of the offense and concluded that ongoing conduct from August 2020 to March 2021 regarding aggressive and retaliatory behavior was a violation of Policy 2.35, Civility in the Workplace. Agency Exh. 3.

Termination was the discipline, based on the two Group II Written Notices.

The Notice of Intent to Discipline, issued April 28, 2021, details the factual bases of the offenses. Agency Exh. 1, pp. 5-6. The outside investigator's report details the investigation findings of fact for both written notices. Agency Exh. 1, pp. 10-21.

As circumstances considered, both Group II Written Notices reflected that the factual defenses made by the Grievant during the due process meeting were insufficient to warrant reduction of the offense, noting that the Grievant was in a senior leadership position and must model professional behavior and civility in the workplace.

The Grievant's supervisor, the deputy commissioner, testified that the mission of the Agency is to serve the most vulnerable population. Grievant did not exhibit the offensive conduct before him, so his knowledge of the conduct came from other staff members, including senior staff. Aside from the behavior offenses, the Grievant was competent at his job. The deputy commissioner described the Grievant's technical ability as stellar. The deputy commissioner received complaints about the Grievant's behavior, to the point of considering discipline. The deputy commissioner hired the Grievant and wanted success.

Because of the verbal complaints, the deputy commissioner provided an interim evaluation to the Grievant, in an effort to make the Grievant successful at his job. That evaluation in October 2020 was an encouraging document, including the issue of honing his skills working with his peers. Agency Exh. 9. This interim evaluation was followed by the Notice of Improvement Needed in November 2020, reacting to multiple instances of abrasive communication and behavior, and directing the Grievant to be mindful of his behavior and to correct it, including a requirement to take the Civility in the Workplace Training course. Agency Exh. 10.

The deputy commissioner testified that he has a responsibility to respond to the complaints received, and that he ultimately elected to get an outside investigator. The investigator found that the Grievant violated Policy 1.60, for failure to demonstrate respect toward agency coworkers, supervisor, managers, and subordinates; and Policy 2.35 for pervasive and persistent behaviors that can objectively be considered "bullying", which had a negative

impact or created a hostile work environment. Additionally, the investigator found heretofore unreported retaliatory behavior. During the investigation, the Grievant denied or did not recall the behavior.

Based on the staff reports and the outside investigator's findings, and considering the Grievant's response, the deputy commissioner elected to issue the two Group II Written Notices with termination.

The technology operations manager testified to the Grievant's aggressive tone and threatening statements (to remove him from work teams) and, impliedly, to fire him. Because he believed the Grievant's intentions and power, he only first reported retaliatory conduct during the formal investigation.

A systems analyst testified to participating in and witnessing a meeting on February 23, 2021, in which the Grievant was aggressive and confrontational toward the database manager who was asking for more information about a project. The Grievant, a superior, berated the database manager and insisted that the manager make a statement that he was already provided the information months earlier.

A division director and peer of the Grievant testified that her interactions with the Grievant. The director testified that the Grievant was aggressive in his behaviors and the director corroborated the Grievant's aggressive, bullying and humiliating behavior toward the database manager in the February 23, 2021, meeting.

The database manager, who reported directly to the Grievant, testified that the Grievant treated him very badly, and that his time working under the Grievant was the darkest days of his life. The manager testified that the Grievant managed by intimidation and bullying, and, because of this, the database manager started looking for another job. The manager stated that in the February 23, 2021, meeting, the Grievant repeatedly insisted that the manager state, wrongly, that the necessary documentation was already provided before addressing the manager's concerns. The manager testified that the Grievant expressed to him implied retaliatory threats that the Grievant was not afraid of human resources regarding his management actions. The manager testified that the Grievant undermined team cohesion, morale, self-worth, and productivity. Further, the Grievant created a toxic environment of bullying, demeaning, intimidating, insensitive, rude, and unprofessional behavior.

Testifying for the Grievant, a director of program operation and business manager testified that they had no negative or inappropriate experiences with the Grievant. Their testimony, however, did not refute the conduct detailed by the Agency's witnesses.

The Grievant testified that the Agency's case against him was just opinions and not facts. The Grievant challenged the Notice of Improvement Needed as without basis. The Grievant testified that he was effective at his job, and all the complaints were individuals' interpretation of events, and out of context. The Grievant asserted that the case against him was a false conspiracy of opinions and exaggeration. The Grievant denied he behaved aggressively and created a toxic environment.

Analysis

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

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 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. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

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. Pursuant to applicable policy, management has 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.

EDR's *Rules* provide that in disciplinary grievances, 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 discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, 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 notices. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has reasonably proved the misconduct of the two Group II Written Notices.

While the Grievant denied the essential facts of the offense, I find the multiple coworkers' testimony credible, and based on the witnesses, the offending conduct consistent with the Grievant's pattern of behavior. The testimony, manner, tone, and demeanor of the testifying witnesses sufficiently prove by a preponderance that the Grievant made the offending comments and exhibited the offending behavior, to a reasonable person standard. The witnesses' observations are consistent and reasonable. The deputy commissioner wanted the Grievant, his hire for the position, to be successful. The Grievant's general denials of the allegations are insufficient to rebut the repeated witnesses who testified that the Grievant's conduct was reasonably offensive—rude, inappropriate, discourteous, unprofessional, and retaliatory. This was not one complaining witness without corroboration. There is evidence that reasonable persons were significantly offended by the Grievant's conduct. Grievant's defense theory that all the witnesses conspired to allege bullying and retaliation lacks any motivation or explanation of some animus toward the Grievant.

Thus, the Agency has proved behavior concerns that the Agency and the supervisor are positioned and obligated to address. Group II offenses include, specifically, violations of Policy 2.35, Civility in the Workplace. Policy 1.60, Standards of Conduct. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group II Written Notices. The Agency conceivably could have imposed lesser discipline, but its election for two Group II Written Notices and job termination is within its discretion to impose progressive discipline, particularly in light of the pattern of behavior reflected in the prior Notice of Improvement Needed.

The Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group II is an appropriate level for bullying and retaliatory behaviors. I find the circumstances support the Agency's election to issue two Group II Written Notices, and job termination is the normal result.

Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules,* § VI.B.1.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

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 [DHRM]." 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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that it could have imposed a Group III for at least one of the Written Notices based on the repeat nature of the behavior. Given the nature of the Written Notices, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline. The Agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

Termination is the normal disciplinary action for two Group II Written Notices unless mitigation weighs in favor of a reduction of discipline. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. As circumstances considered, the deputy commissioner noted that the conduct was similar to that addressed by the Notice of Improvement Needed, that the Grievant did not take accountability for how his actions affected staff. Further, that the Grievant was in a senior leadership position, and the Grievant repeatedly failed to model professional behavior for civility in the workplace.

The Grievant had a short tenure with the agency and did not have a record of satisfactory work performance. Regardless, under the *Rules*, however, an employee's length of service and satisfactory work performance, standing alone, are not sufficient for a hearing officer to mitigate disciplinary action. *Thus, the hearing officer lacks authority to reduce the discipline on these bases.* On the issue of mitigation, the Grievant bears the burden of proof, and he lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

Under the EDR's Hearing Rules, the hearing officer must give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's two Group II Written Notices with termination must be and 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.