

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 11618

Hearing Officer Appointment: November 2, 2020  
Hearing Date: December 14, 2020  
Decision Issued: January 8, 2021

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently the Grounds Shop Supervisor at the Virginia Military Institute (the “VMI”, the “Institute” or the “Agency”). The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued on October 7, 2020 (with termination effective October 7, 2020) by management of the VMI, as described in the Grievance Form A dated October 12, 2020.

In his Grievance Form A, the Grievant challenges the discipline seeking reinstatement, restoration of back pay and benefits. In the alternative, the Grievant asks for mitigation of the discipline.

The hearing officer’s appointment is effective November 2, 2020.

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.

At the hearing, the Grievant represented himself 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 1-22 in the Agency's exhibit binder and exhibits D, E, G, K, M, O and P from the Grievant.<sup>1</sup>

During the first prehearing conference call on November 11, 2020, the parties confirmed that they wanted to hold the hearing in person.

Accordingly, on December 14, 2020, the parties, legal counsel and the hearing officer appeared in the hearing room at the VMI, wearing masks and observing social distancing and other applicable protocols.

### 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 the Grounds Shop Supervisor in the Physical Plant. In this capacity, the Grievant was responsible for supervising approximately a dozen

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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.

employees, maintaining the grounds and performing other duties assigned to the Grievant's shop. The Grievant has worked for VMI for approximately 13 years. AE 1, 2 & 21.

2. The Grievant's direct supervisor was the Director of Maintenance & Operations, who, in turn, reports to the Director of Physical Plant, LC. AE 21.
3. The Virginia Military Institute is a state college, supported by the Commonwealth of Virginia, offering higher education in the fields of engineering, sciences and the arts. The Institute provides academic study of the highest possible quality conducted in and facilitated by a rigorous system of military discipline. AE 5.
4. VMI is distinctive in the world of higher education due to its mission to prepare educated, honorable, and steadfast leaders. The unique culture of VMI develops in cadets the highest standards of honor, respect, civility, self-discipline, and professionalism. AE 5.
4. The Grievant, in the important Grounds Shop Supervisor role, supervised numerous VMI grounds personnel in the important function of keeping the campus "always on parade". It is integrally important to its mission and military tradition that the grounds appear immaculate to cadets, alumni, the public, staff and visiting dignitaries, such as Vice President more recently.
5. According to his Employee Work Profile ("EWP"), the Grievant is the effective Supervisor of the Grounds Shop, responsible for coordinating the maintenance and support of all grounds, setups, snow removal, etc. post wide and supports the Agency's grounds programs by providing leadership and supervision to grounds workers in his shop. AE 8.

6. Core responsibilities include:

60% 1. Primary Shop Duties

0 Supervises the Grounds Shop, responsible for the proper maintenance and upkeep of all VMI property. The following list includes major duties but is not all inclusive.

- Mowing and edging
- Seeding, fertilization, and spraying
- Tree/hedge trimming, pruning, and removal
- Road repairs
- Grading unpaved roads and parking areas
- Hauling and disposing of office furniture
- Mulching and landscaping
- Snow removal
- Athletic Field care and maintenance
- Special Event set ups and tear downs
- Street sweeping contract
- Other duties as assigned

AE 8.

7. Concerning his job responsibilities of supervision and leadership to grounds staff, amongst other things, the EWP provides:

## Personnel Expectations

- 0 Develops and executes a comprehensive training program for shop personnel that covers all aspects of the Grounds Shop responsibilities.
- 0 Ensures personnel are properly equipped and wear appropriate personal protective equipment (PPE) when performing daily tasks.
- 0 Ensures all personnel adhere to B&G policies governing the conduct, wearing of the uniform, leave, proper operation of vehicles, etc. in order to make B&G a safe and professional place to work.
- 0 Enforces established appearance and conduct standards to ensure the B&G organization is represented to the highest level and respected in the VMI community.

## AE 8.

8. On April 2, 2019, the former Director of Physical Plant, F, submitted a WO 203562: "to spruce up the landscaping around the 404 Parade Avenue residence ("404"). The work should be scheduled to be done after the contractor has finished the renovation work and left the job site, but just before the projected move-in of SM currently scheduled for May 1." See Written Notice (WN), Attachment 12. AE 2.

9. 404 is in a very visible, prominent part of campus/post in military terminology. SM has had a distinguished military career and is in a prominent position at VMI, leading and an example to cadets and staff alike.

10. On May 23, 2019, F requested an update from Grievant and Grievant responded, "We re-sodded where the dumpster was located before graduation and that all. Not sure what else needs to be done." See WN Attachment 13.

11. On May 29, 2019, LC inspected the landscaping work at 404 VMI Parade Avenue and it was obvious that the landscaping had not been satisfactorily completed to VMI standards and commensurate with surrounding houses according to VMI policy even though Grievant had previously stated "not sure what else needs to be done". LC took photos of the "eye sore" and sent Grievant an email requiring maintenance. See WN, Attachments 15 and 16.

12. On June 9, 2020, SM, now a paying tenant of 404, himself sent in a Work Order (WO) 216071 requesting clean up of "404 VMI Parade Ave side landscape growth: I spoke with [ JC, Director of Maintenance & Operations and Grievant's immediate supervisor] today about the weeds and growth on the side yard of 404 VMI Parade. Someone came last year and moved some rocks and cut down a lot of the weeds. I request it be landscaped when the opportunity arises." See WN, Attachment 17

13. On June 23, 2020, after some perfunctory work, approved by SM's spouse but not directly by SM, Grievant closed WO 216071 marking it completed. See WN, Attachment 17. Appropriate landscaping conforming to VMI policy and standards had not been done, as evidenced in photos from August 11, 2020 shown in WN, Attachment 3. AE 2.

14. On August 11, 2020, Work Order 217471 was submitted by the Deputy Superintendent, GC, stating, "404 Parade - Flower Bed: Please provide the plan and timeline for implanting plantings for these flower beds." WN, Attachments 2 & 3.

15. On August 11, 2020, after receiving an email response from Grievant stated, "going to be worked on late fall", GC then required a simple plan of weeding and some plants. LC subsequently gave Grievant the directive to have the simple work completed by August 28, 2020. See WN, Attachment 4.

16. On August 17, 2020, after some perfunctory work, Grievant closed Work Order 217471 and marked it completed. The simple plan was not completed to VMI standards, nor were any plants planted. The Work Order was not complete and should not have been closed.

17. On August 18, 2020, Grievant sent LC an email suggesting a tree, a Mt. Fuji Flowering Cherry Tree, to plant at 404 VMI Parade Ave, clearly indicating that the simple plan was not completed. Grievant also stated, "You wanted the top section finished by 8/28/2020", which acknowledges understanding of the deadline for the simple landscaping. See WN, Attachment 6.

18. On August 20, 2020, LC responded to the inquiry about the Cherry Tree. She asked what other plants Grievant planned to plant, and even suggested a few specific plants to consider, namely "lemon grass, day lilies, sage, coneflower, or plantain lily." See WN Attachment 7. Grievant rejected plantain lily but said the other ideas were fine. Id.

19. On August 28, 2020, Grievant did not meet deadline for installation of the simple landscaping. No new plantings had been planted. Grievant ignored the deadline and did not provide LC or his supervisor an update.

20. On September 1, 2020, LC sent Grievant an email asking for an update. Grievant responded via email, "I asked for a quote for plants on the 20th and did not receive this quote until Tuesday or Wednesday of last week (after My follow up). As for 404 Parade house the tree was ordered and is ready to be planted. They are waiting on the Miss utility ticket to go through". See WN, Attachment 8.

21. On September 2, 20, LC responded via email, "You had not previously indicated that you had concerns with meeting the deadline for installation of landscaping at 404 Parade, nor did you ask for additional time. I was surprised and disappointed to see that it had not been done". Grievant did not provide a response. See WN, Attachment 9.

22. On September 8, 2020, Grievant provided an update via email, "The miss utility ticket has went thru. With the VP coming on Thursday I think the tree will be planted next week." No update was provided regarding the other plantings. See WN, Attachment 10A. In a separate email on September 9, 2020, Grievant stated, "The tree at 404 Parade was planted today". See WN, Attachment 10B.

23. As of September 18, 2020, the plantings still had not been planted. No update had been provided on the plantings since September 1, 2020. Photographs were taken on 9/16/20 of the incomplete landscaping at 404 VMI Parade Ave. See WN, Attachment 11.

24. Accordingly, Grievant failed to follow instructions to landscape the side yard of 404 VMI Parade Ave. He failed to meet the deadline of 8/28/20 for a simple landscape plan as directed by LC. Grievant has shown insubordination by failing to complete the landscaping by 9/29/20. Further insubordination is shown by the fact that he did not provide an update concerning the status of the plantings timely after 9/1/20.

25. Recognizing the severity of the Grievant's disciplinary infractions, on October 7, 2020, Management issued to the Grievant a Group III Written Notice with termination effective the same date, for offenses including failure to follow instruction and/or policy and for insubordination. The hearing officer decides that the Agency did not meet its burden of proof concerning the falsifying records charge, as discussed in more detail below. AE 2.



25. The Grievant's disciplinary infractions concerning this case did negatively impact the Agency's operations.
26. 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.
27. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
28. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
29. 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.

#### 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 a Group III offense. 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 offenses are appropriately classified at the Group III level with the Agency appropriately exercising the discipline. Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." While the hearing officer finds that the Agency did not prove falsification of records, a Group III offense, the hearing officer agrees with the Agency's attorney that failure to follow instructions on multiple occasions and insubordination on multiple occasions, all of which materially adversely impacted the Agency, along with the Grievant's supervisory status, all combined, rise to the level of a Group III offense in this case. AE 3, page 23.

In any event a recent, prior, active Group II Written Notice embracing the same elements of failure to follow instruction and insubordination, inevitably supports the Agency decision to terminate. A second Group II Written Notice **normally** results in discharge. AE 3, page 22.

Management held the Grievant to a higher standard as a supervisor. EDR has consistently held supervisors 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." Pursuant to his EWP and policy, the Grievant was expected and required

to present a positive role model for subordinates, cadets and fellow employees of any rank in this unique military context.

EDR also addressed this issue in its Ruling Number 2015-3953 (August 29, 2014):

“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. [Footnote omitted]. DHRM has previously determined that “agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees.” [Footnote omitted]. 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. [Footnote omitted]. Here, the agency appears to have determined that the grievant’s misconduct was more severe based, in part, on his position as a supervisor. [Footnote omitted]. 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.”

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that the violations rose to the level of a 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 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 Grievant's many years of stellar service to the Agency;
2. the demands of the Grievant's work environment;
3. the Grievant's good job performance and evaluations (Extraordinary Contributor Rating for the past 10 evaluations, including most recently, 2019);
4. the effect of the COVID-19 pandemic;
5. being short-staffed;
6. the time demands of many required "set-ups"; and
7. the lack of a horticulturist

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 an important supervisory position. 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.

"Falsifying" is not defined by the SOC, but for purposes of this proceeding, the hearing officer interprets this provision to require proof of an intent to falsify by the employee. This interpretation is consistent with the definition of "Falsify" found in Black's Law Dictionary (6<sup>th</sup> Edition) which provides in part as follows: "**Falsify**. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document." Accordingly, the word "falsify" means being intentionally or knowingly untrue.

It is concerning this requisite element of intent that the hearing officer decides that the Department has failed to sustain its burden of proof concerning the Falsification Offenses.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld

the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

After the hearing, the Grievant sent the hearing officer an email stating, amongst other things, that he "was just informed that during yesterday's hearing while we took a break [Agency attorney] and [LC] went into [GC's] office and shut the door. This occurred right after [LC's] testimony and right before [GC] testified.

I do not think this is fair nor ethical. "



The Agency attorney responded, amongst other things, "I and LC went into GC's office to tell him it was time for him to go testify and then we proceeded to say how hungry we were and ate m&ms." The attorney also proceeded to refute certain allegations made by Grievant.

The Grievant responded, amongst other things, as follows:

"I would like to respond to [Attorney's] response:

[Name] is attorney and knows the rules and there is no excuse for making a mockery of this hearing or the hearing officer. When she and [LC] went together to [GC's office] after [LC's] testimony and slammed the door shut this suggests 2 things: One, I am [Attorney] and I will do what I want. Two, we want to engage in a private conversation with the next witness. If someone were simply notifying [GC] that he was now needed to testify, why did it take two people and why shut the door? When someone closes the door that represents privacy."

The Attorney followed, providing in part:

"Mr. Robinson - this will be my final response to this matter unless directed otherwise by you. I will not respond further to [Grievant].

Yes I am an attorney. I know the rules and follow the rules and did so in this hearing at all times. My client has the highest integrity and so do I.

If Grievant would like to point to some part of the grievance procedure he feels was violated then he needs to bring that forward."

Finally, Grievant replied, in part:

"Mr. Robinson

I would like to respond to [Attorney's] comments.

I prefer to not respond nor interact with [Attorney] moving forward.

Second, [Attorney] seemed to forget that the door was slammed closed. Let's not forget that. While behind closed doors with someone who just testified and someone who was about to testify.”

The Grievant has not specified any part of the Grievance Procedure Manual or Rules, or indeed any other applicable rules or authority which were violated by the Agency or its attorney and the hearing officer's own research has revealed none. Accordingly, faced only with general aspersions and speculation concerning the challenged gathering and the content of any communications therein, the hearing officer denies any relief to the Grievant in this regard.

The Grievant raised generally the affirmative defense of retaliation but did not come close to meeting his burden of proof in this regard.

#### 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>

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

ENTER 1/8/2021



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).