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. 11628

Hearing Date: January 21, 2021
Decision Issued: January 25, 2021

PROCEDURAL HISTORY

On October 29, 2020, Grievant was issued a Group III Written Notice of disciplinary action for violation of Policy 2.35, Civility in the Workplace (threatening behavior).

On November 6, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 30, 2020, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On January 21, 2021, a hearing was held via remote video to comply with pandemic restrictions.

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 2.35, Civility in the Workplace, provides that the Commonwealth strictly forbids threatening or violent behaviors of employees, and that employees should report incidents of prohibited conduct as soon as possible after the incident occurs. Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct. Agency Exh. 4.

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 facilities management operations specialist, with 20 years of service and with no prior active Written Notices.

The Group III Written Notice, with termination, issued by the Grievant's supervisor on October 29, 2020, detailed the offense:

> The evidence for this disciplinary action with termination is on October 5, 2020. [The Grievant]'s coworker reported to management that in recent weeks she began blaming VCU for her poor eating habits and possible medical concerns. During one of her shifts, she began making comments about the new "day lights" being installed in the operations center when, in the middle of her angry tirade, she stated, "Please God don't let me come in and shoot up this place." When her coworker immediately addressed this comment with her, she stated to them, "I won't be coming down here, I'll be going upstairs." Workplace violence is defined as any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress. Behaviors that undermine workplace safety such as making threats to injury another person are not acceptable or permitted at any time. Given the Commonwealth of Virginia strictly forbids threatening or violent behaviors of employees, I am terminating [the Grievant]'s employment with VCU.

Agency Exh. 2.

As circumstances considered, the Group III Written Notice included:

> The decision was made not to mitigate disciplinary action based on statements [the Grievant] made which were reported on October 5, 2020. [The Grievant]'s conduct

created a reasonable fear of injury to her fellow employees, and her employment with VCU is terminated effective October 29, 2020.

The coworker testified credibly and consistently with the facts recited in the Group III Written Notice. He testified that he had a good working relationship with the Grievant, but the Grievant spoke often about how management was out to get her and did not respond appropriately to her various concerns. He emphasized his reluctance to report and did so only after thoughtfully weighing the import of doing so and risk of not reporting.

The Grievant's immediate supervisor testified that the Grievant was a valued and competent employee, and one she regretted terminating. The Grievant has supervisory responsibilities over three employees. The supervisor testified that the coworker was sincerely upset by the threat, and that the coworker's report of the offending statements was consistent with the supervisor's experience with the Grievant's history of making outbursts. The supervisor, having known the Grievant for many years, did not believe the Grievant would actually act on the threat, but the comments were sufficiently alarming and threatening that they could not be reasonably mitigated to less than job termination. The supervisor testified that firing the Grievant was very tough for her to do.

The operations superintendent testified that the reporting coworker had no history of making complaints, and, when the coworker brought this to his attention, it was out of the ordinary. He testified that the Grievant was known for making outbursts, but this one was so severe. He also testified to his reluctance to terminate the Grievant's employment, that it put the operations in a bind, but he had to consider the overall well-being of the operations center.

The VCU police investigator testified to investigation and recorded interview of the Grievant. The investigator turned up no prior offenses or history of making threats, the Grievant denied making the statement, and the investigator concluded the Grievant did not present an immediate threat.

The Human Resources manager testified that the coworker's story was very consistent, and that he was very credible, sure and confident in his report of the threatening statements. Other witnesses in the vicinity did not hear the Grievant's comments or conversation. Having confidence in the coworker's specific and confident complaint, the HR manager also became concerned about the Grievant's denial of making the statements.

The Grievant testified that she did not say the comments reported by the coworker. Her denial was consistent with her prior denials. She attributed the coworker's false reporting to his dissatisfaction with the Grievant's inability to wear a mask during the entire shift because of medical reasons. The Grievant testified that she does not even have access to a gun.

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 notice. 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 Group III Written Notice.

While the Grievant denied the essential facts of the offense, I find the coworker's testimony credible, and based on other 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 threatening comments. The Grievant's denial of the allegation precluded any presentation or basis to question whether the comments were reasonably threatening.

Thus, the Agency has proved behavior concerns that the Agency and the supervisor are positioned and obligated to address. Group III 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 threatening behavior as charged in the Group III Written Notice. The Agency, conceivably could have imposed lesser discipline, but its election for a Group III Written Notice and job termination is within its discretion to impose progressive discipline.

The Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group III is an appropriate level for threatening behavior. I find the circumstances support the Agency's election to issue a Group III Written Notice, 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 imposed less than the maximum discipline of termination. 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 further than explained above. The Agency has proved (i) the employee engaged in the behavior described in the written notices (as modified), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the

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

Termination is the normal disciplinary action for a Group III Written Notice 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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The Grievant's length of service and the uncontradicted evidence of her good work performance and record might very well justify discipline short of job termination, in management's discretion. 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 she 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 Group III Written Notice with termination must be and is 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.

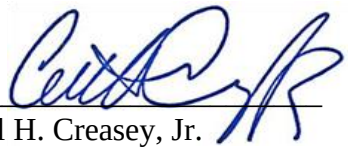
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.