

**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. 11613

Hearing Date: February 10, 2021  
February 24, 2021  
Decision Issued: March 5, 2021

**PROCEDURAL HISTORY**

Grievant was the chief administrative officer for the Department of Fire Programs (“the Agency”). On August 31, 2020, the Grievant was charged with eight Group II Written Notices of discipline, for failure to follow instructions and/or policy, with job termination. The termination was based on accumulation of discipline.

On September 24, 2020, Grievant, by counsel, timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. The Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) referred the grievance of eight Written Notices for one hearing.

On October 27, 2020, EDR appointed the Hearing Officer. During the pre-hearing conference, based on availability of the parties, the grievance hearing was scheduled for February 10, 2020, on which date the grievance hearing was held but not completed. The conclusion of the hearing was conducted on February 24, 2021. For pandemic protocol, the hearing was held via remote video platform.

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  
Counsel for Grievant  
Representative for Agency  
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?

Through her grievance filings, the Grievant, a black female, asserted disparate treatment when compared to white and male employees. She requested rescission of the Written Notices, reinstatement, and other associated relief, including the amount owed the agency in overpayment and an opportunity to pay it back. At the hearing, the grievant stated she no longer was seeking reinstatement as she has found other employment.

## 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 his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. 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.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group Offenses and permissible discipline, including termination. Agency Exh. 13. More specifically at issue is DHRM Policy 5.10, Educational Assistance, Agency Exh. 11, and the Agency's Educational Assistance Policy, Agency Exh. 10. Both policies provide that reimbursement is limited to the employee's cost after applying any reductions for scholarships, etc.

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 disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. 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."

### 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 Grievant as the chief administrative officer, with several years of tenure. She had no prior, active Written Notices.

The eight Group II Written Notices issued August 31, 2020, were issued as follows:

1.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on July 19, 2016. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

2.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on December 20, 2016. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

3.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on July 13, 2017. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

4.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on August 30, 2017. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

5.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on October 3, 2017. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

6.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on October 24, 2017. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

7.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on January 3, 2018. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

8.

Failure to follow instructions and/or policy – As a result of an audit conducted by the Auditor of Public Accounts in 2018 and subsequent investigation by the Virginia State Police which concluded approximately in May 2020, it was discovered that you failed to follow agency policy by not applying the tuition discount that you received from the military towards the course that you submitted for reimbursement on March 20, 2018. The agency subsequently reimbursed you for the full cost of the course which was in violation of the agency educational assistance policy.

Agency Exh 56.

As for circumstances considered, each of the Written Notices, in Section IV, stated:

In taking this disciplinary action, consideration has been given to your length of state service, your previous performance, your current performance and work contributions, and your response to the advance notice of discipline. However, as the senior VDFP employee charged with overseeing all fiscal operations/duties for the Department of Fire Programs, your behavior has demonstrated a profound lack of integrity and gross neglect of duty to your job, the agency and the public therefore, no further mitigation is warranted. Based on DHRM Policy 1.60-Standards of Conduct, your employment with the Virginia Department of Fire Programs is being terminated effectively immediately due to the accumulation of written notices.

The Agency's witnesses credibly testified consistently with the charges and circumstances described in the Written Notices and the Grievant either confirmed or did not

challenge the essential facts of the overpayment. The Grievant received a military discount on the tuition for all classes reimbursed; she requested reimbursement for the full price of the courses; and, the Agency reimbursed the Grievant for the full, non-discounted tuition.

The supervisor (the department Chief), who issued the Written Notices, testified that the Grievant, as the chief administrative officer of the agency, was responsible for the agency's human resources and fiscal areas. The Grievant was the highest salaried employee responsible for fiscal management. The Chief also testified that the state auditor of public accounts discovered the overpayment of tuition reimbursement to the Grievant and notified the state police. After its investigation, the state police pursued felony charges against the Grievant, but, ultimately, the charges were nolle prossed. Grievant Exh. 25. At the conclusion of the criminal procedure, the Agency issued a written notice to the Grievant for each of eight documented occurrences. Agency Exh. 56. The state police alleged ten instances of overpayment, but the police did not share information with the Agency. Agency Exh. 33. Because the auditor and/or state police retained certain documents related to the matter, the agency Chief could not calculate an exact total of the overpayments beyond the eight documented for the written notices.

The offenses are repetitively similar. For instance, on July 19, 2016, the Grievant requested \$1,770 for reimbursement for a Summer 2016 class. The university official itemized statement shows the tuition of \$1,770 per class for two classes, but it also shows a corresponding credit for the military discount:

Term	Subject	Course	Title	Credit Hours	Tuition
B	BUSI	520	Strategic Marketing Management	3	\$1,770.00
D	BUSI	643	Workforce Planning & Employmen	3	\$1,770.00

TERM	DESCRIPTION	CHARGES	CREDITS
Summer 2016	Tuition - Liberty Online	\$3,540.00	
Summer 2016	Tuition Discount- Military		\$1,890.00
Summer 2016	Book Voucher Advance- Online	\$1,000.00	
	<b>Subtotal</b>	<b>\$4,540.00</b>	<b>\$1,890.00</b>
		<b>Previous Balance</b>	<b>\$0.00</b>
		<b>Account Balance</b>	<b>\$2,650.00</b>

Agency Exh. 17. The military discount per class is \$945. Based on the Grievant's reimbursement request for one class, she received from the Agency the full \$1,770, resulting in a \$945 overpayment for Written Notice no. 1. The reimbursement requests for tuition exceeding the Grievant's actual cost are violations of the education assistance policy. The other Written Notices show similar overpayments.

Regarding the Grievant's request for reimbursement on October 24, 2017, Written Notice no. 6, the Grievant requested and received \$1,845 for a Fall 2017 class, and the supporting university official itemized statement had the discount and account balance redacted:

**COURSE INFORMATION**

Subject	Course	Course Title	Credit Hours	Tuition Cost
<del>LFC</del>	<del>501</del>	<del>Introduction to Life Coaching</del>	<del>3</del>	<del>\$1,845.00</del>
<del>INBS</del>	<del>600</del>	<del>Interdisciplinary Research</del>	<del>3</del>	<del>\$1,845.00</del>
<del>INBS</del>	<del>500</del>	<del>Intro Interdisciplinary Studie</del>	<del>1</del>	<del>\$615.00</del>
<b>TOTAL</b>			<b>7</b>	<b>(\$2,380.00)</b>

**SUMMARY OF ACCOUNT**

Semester	Description	Charges	Payments
<b>TOTAL</b>			
		<b>ACCOUNT BALANCE</b>	

Agency Exh. 22. The other Written Notices demonstrate similar omissions regarding the Grievant’s military discount, resulting in an overpaid reimbursement for each.

The Chief also testified that he was unaware of any other similar circumstance within the Agency—an executive employee requesting and receiving payment for reimbursement for money not owed. There have been instances when employees were responsible for repaying the Agency for credit card purchases or cell phone use, and such matters are handled on a case-by-case basis. In the present matter, the state auditor, not the Agency, referred the Grievant’s matter to the state police. The Chief denied that any gender or racial factors affected his discipline decision. The Grievant was the chief administrative officer, charged with fiscal responsibility and expected to set an example for the Agency’s employees. The Assistant Chief was disciplined for her oversight neglect in approving one of the Grievant’s reimbursement requests.

The Assistant Chief testified similarly, and she denied that she personally approved more than one of the Grievant’s tuition reimbursement requests. Her stamped signature on the other requests were not with her approval. For instance, the Grievant’s reimbursement request on August 30, 2017 (Written Notice no. 4), was made during the Assistant Chief’s annual leave, which bears the Assistant Chief’s stamped signature. The supporting documentation—the university official itemized statement, had “white out” tape over the summary of account, where the Grievant’s discount would appear:

COURSE INFORMATION				
Subject	Course	Course Title	Credit Hours	Tuition Cost
BUSI	004	International Business	3	<del>\$1,845.00</del>
BUSI	502	Servant Leadership	3	\$1,845.00
<b>TOTAL</b>			<del>6</del>	<del>\$3,690.00</del>

SUMMARY OF ACCOUNT			
Semester	Description	Charges	Payments
<b>TOTAL</b>			
		<b>ACCOUNT BALANCE</b>	\$0.00

Agency Exh. 20.

The Grievant testified that the Agency had multiple staff vacancies, and she was having difficulty managing because of this. The Grievant testified that she is not an accountant and did not realize she was submitting reimbursement requests that did not reflect the after-discount tuition charges. The Grievant became aware of the issue when the state police investigator contacted and interviewed her—not directly from the Agency. According to the Grievant, the account statements from the university did not clearly enough show the discount. The Grievant redacted the discount information from some university account statements she submitted, and the Grievant testified that a peer at the Agency suggested doing so to avoid confusion for the reimbursement request. The Grievant denied the redactions were done to defraud the Agency. The Grievant testified that she understood the account statements to show the correct reimbursement amount, and she did not question the figure. The Grievant testified that the reimbursement requests were a simple mistake. The Grievant testified that the Chief offered her the opportunity to resign in lieu of termination (without repayment), but she did not accept. The Agency has never presented her with an overpayment figure.

The Agency's former chief testified that the Grievant was a team player, was ethical, and worked hard for the Agency's best interests. The former chief testified that the Grievant was partly responsible for seeking the state audit of the Agency. The former chief testified that he was unaware of another employee having made a similar mistake in seeking reimbursement. The former chief also confirmed that the Grievant was competent in fiscal matters, and that

understanding invoices and receipts is a normal aspect of the Grievant's job—a responsible position for setting an example for the Agency's employees.

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. 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. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The evidence preponderates in showing that the Grievant failed to follow policy as set forth in the eight Written Notices. Such behavior violated the applicable written policy, whether by simple or gross neglect. The Grievant's executive position, particularly in fiscal responsibility, increases her accountability for her multiple tuition reimbursement requests. Such failure to comply with policy is a Group II offense. Under the Standards of Conduct, failure to follow policy is a typical Group II offense. Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offenses and level of discipline—multiple Group II written notices support termination based on accumulated discipline under the Standards of Conduct.

#### Mitigation

The Agency had leeway to impose discipline along the continuum less than termination. However, the Agency expressed its inability to mitigate the discipline to less than termination because of the number and character of the offenses, and the Grievant's executive responsibility for fiscal oversight. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

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 the Office of Employment Dispute Resolution.” 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.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the



limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1.

On the issue of mitigation, EDR has ruled:

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency’s discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* “exceeds the limits of reasonableness” standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management’s discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

When an agency’s decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer “will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only ‘assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.’”

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Grievant was aware of the requirements of the education assistance policy, and acknowledges the reimbursement overpayments. She would like to repay if provided a total figure. The Grievant has alleged disparate treatment by the Agency. In her response to the Notice of Due Process, the Grievant wrote:

During my tenure at the [Agency] I have observed an inconsistent application of disciplinary actions taken against black employees, become target of retaliation, bullied in the workplace and/or terminated for speaking up while other employees commit the same or similar violations with less severe consequences.

As the Chief Administrative Officer and the only black female on the leadership team at the [Agency], I became a target for disparate treatment and undermined in the ability to direct staff on more than one occasion.

The response then lists incidents of the Grievant’s observations or dissatisfaction. Grievant Exh. 5.

The incidents of alleged disparate treatment were not sufficiently similar, and, because the referral of the Grievant to law enforcement was made by the outside auditor, and not the Agency, there are no reliable facts presented to show disparate treatment for similar offenses by any employee, let alone one in an executive position like the Grievant. The Grievant has access to her university's statements of account, she knows or should know the reimbursement requests she has submitted (the Written Notices detail eight of them), so she is capable of calculating her overpayment. There is no evidence of improper disciplinary motive by the Agency.

The Grievant's position as Chief Administrative Officer includes providing executive level management to all administrative/business management services for the Agency, including six major support sections, including finance/fiscal services. Grievant's Exh. 6. This responsibility puts the Grievant in an exclusive position of responsibility for the Agency, including oversight of the very reimbursement overpayments she received.

The hearing officer accepts, recognizes, and upholds the Agency's description of the nature and exemplary role of the chief administrative officer. The applicable policies and standards of conduct provide stringent expectations of Agency staff. Termination is the normal disciplinary action for accumulation of two or more Group II offenses, unless mitigation weighs in favor of a reduction of discipline. There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that termination was its only option.

### DECISION

For the reasons stated herein, there is no basis for me to reverse the Agency's eight Group II Written Notices, with termination. Further, there is no basis to find mitigating circumstances sufficient to reverse the level of discipline. Accordingly, the Agency's eight Group II Written Notices, with termination, 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 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>

[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

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