

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 12077

Hearing Date: April 11, 2024
Decision Issued: April 13, 2024

PROCEDURAL HISTORY

On December 11, 2023, Grievant was issued a Group III Written Notice with termination.¹ On January 9, 2024, Grievant filed a grievance challenging the Agency's actions.² The grievance was assigned to this Hearing Officer on February 26, 2024. A hearing was held on April 11, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Grievant Advocate
Grievant
Witnesses

ISSUES

Did Grievant violate DHRM Policy 1.60?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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

¹ Agency Exh. 1, at 3

² Grievant Exh. 1, at 7

³ See Va. Code § 2.2-3004(B)

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. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact. Agency submitted a notebook containing pages 1 through 79. In addition, it included a USB drive that contained 3 videos. The Agency included these if needed as rebuttal evidence. They were not used or viewed during the hearing and I have not used them as a basis for this decision. There was objection to pages 20 and 21, but during the course of the hearing, page 21 was admitted into evidence. Accordingly, the notebook, with the exception of page 20, was accepted as Agency Exhibit 1. Grievant submitted a notebook containing pages 1 through 112. This notebook was accepted as Grievant Exhibit 1.

Two witnesses testified on behalf of the Agency: the Security Manager (SM) and the HR & Payroll Supervisor (HR). Grievant testified and called one witness.

Several sections of DHRM Policy 1.60 are relevant to this matter.

1.60, Policy Summary: *"This policy sets forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace ... when conduct impacts and employee's ability to do their job and/or influences the agency's overall effectiveness."*⁷

1.60, Guidelines states: ... *"There may be circumstances when an employee's conduct requires immediate disciplinary action without employing progressive discipline. If the misconduct and/or unacceptable performance is of an especially serious nature, a first offence may warrant significant discipline, including termination ..."*⁸

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁷ Agency Exh. 1, at 47

⁸ Agency Exh. 1 at 49

1.60, **Expectations of Conduct for Employees** states: ... “Report to work as scheduled and seek approval from the supervisor in advance for any changes to the established work schedule... **Use state equipment**, time, and resources judiciously and **as authorized**.”⁹ (Emphasis added)

1.60, **Disciplinary Actions** states: ... “Under certain circumstances, an offense typically associated with one offense category may be elevated to a higher-level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceed agency norms.”¹⁰

1.60 **Disciplinary Actions** defines Group offenses as follows: **Group 1** ...repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations... **Group II** ... misconduct of a more serious and/or repeat nature... that seriously impact business operations and/or constitute neglect of duty involving major consequences, insubordinate behaviors and abuse of state resources, violations of policies, procedures,... **Group III**... misconduct of such a serious nature that a first occurrence normally should warrant termination... for example, endanger others in the workplace...indicate significant neglect of duty, result in disruption of the workplace, or other serious violations of policies, procedures...¹¹

1.60 **Attachment A** states: “Contingent with business needs and operational requirements, Agencies may determine that the impact of certain actions are more serious and issue a higher level of action than what is described in the table below. Such determinations may be demonstrated through the accountability of the agency to the population served and its obligations regarding the safety and well-being of the public...”¹²

Group I offenses include tardiness and unsatisfactory work performance.¹³ **Group II** offenses include failure to follow supervisor’s instructions, comply with written policy or agency procedures, leaving work without permission, failure to report to work without proper notice or permission and unauthorized use of state property. **Group III** offenses include significant neglect of duty and serious violations of policy and procedures.¹⁴

SM testified that the purpose of his department is to provide security and a safe environment for all people who are at the Agency facility. As a part of his managerial function, he periodically reviews the video from cameras located throughout the facility.

Periodically, this Agency allows third party vendors to utilize its space. On November 10, SM sent Grievant an email stating “Good afternoon. Report to the Post Card show when you arrive in Nicholas. You will be there until 6:30. Then you can go to Moyer. Thanks.”

⁹ Agency Exh. 1, at 50

¹⁰ Agency Exh. 1 at 54

¹¹ Agency Exh. at 54,55

¹² Agency Exh. 1 at 67

¹³ Agency Exh. 1 at 67

¹⁴ Agency Exh. 1 at 68

Grievant acknowledged this e-mail saying, “OK no problem.”¹⁵ Grievant’s shift assignment for November 10 was 4:00 PM to midnight.¹⁶

A video review shows Grievant arriving at Nicholas at 4:09 PM and he is dressed in street clothes, not his uniform.¹⁷ He is tardy, a **Group I offense**. At 4:27 PM, Grievant is seen entered the Fitness center (also located in Nicholas) wearing gym clothes.¹⁸ Grievant is seen exiting the Fitness Center at 5:57 PM and first appears in uniform at 6:43 PM.¹⁹ Grievant was in the Fitness Center and not at the Post Card show as assigned. This constitutes a failure to follow his supervisor’s instructions, a **Group II offense**. It also is a failure to report to work, another **Group II offense** and is unsatisfactory work performance, a **Group I offense**. Further, as the vendor had requested security at its event, Grievant’s failure to be present and in uniform created the potential for a lack of safety to those attending. Grievant’s advocate argued that being in the building was enough to comply with the instructions to be at the Post Card show and to be at work. Exercising in the Fitness Center, out of uniform, rendered Grievant to the position of being a member of the public with no special identification as a security officer. He was not at work as a security officer while exercising in the Fitness Center.

On May 2, SM sent all security officers an email regarding use of the Fitness Center.²⁰ This email stated that for liability and safety reasons, no one would be allowed to use the Fitness Center unless a Fitness Center employee was present. From 4:27 through 5:57 PM, while Grievant made use of the Fitness Center, no such employee was present. This is a violation of written policy, a **Group II offense**. Grievant was using state property, the equipment in the Fitness Center, for which he no authorization to use without a Fitness Center employee being present. Unauthorized use of state property is a **Group II offense**. Grievant’s advocate argued that there was no damage to any of the equipment. This misses the point. The issue is unauthorized use, not use with subsequent damage.

Grievant is seen leaving his post at 10:33 PM on November 10.²¹ His shift was to midnight. SM testified that, if the security officer for the next shift, midnight to 8:00 AM, was present, it was permissible for Grievant to leave at 11:30 PM. Leaving work approximately 1 hour early, assuming the next shift security office was present, is a **Group II offense**.

On February 21, 2022, SM sent Grievant an email regarding leaving campus for extended meal breaks and/or leaving prior to the end of his shift.²² The final sentence of this email stated: “*Any further occurrences will not be tolerated and will warrant disciplinary action.*”

When the issues of November 10 became known, SM was ordered to review all videos of the prior 30 days. On November 6, Grievant was assigned the 4:00 PM to midnight shift.²³ Video shows Grievant entering the Fitness Center at 7:40 PM, leaving at 8:53 PM, and exiting

¹⁵ Agency Exh. 1 at 13

¹⁶ Agency Exh. 1 at 23

¹⁷ Agency Exh. 1 at 9

¹⁸ Agency Exh. 1 at 6

¹⁹ Agency Exh. 1 at 10

²⁰ Agency Exhibit 1 at 14

²¹ Agency Exh. 1 at 11

²² Agency Exh. 1 at 16

²³ Agency Exh. 1 at 22

a restroom in uniform at 9:13 PM.²⁴ No Fitness Center employee is present in violation of written policy, a **Group II offense** and state property is being used without authorization, a **Group II offense**. Grievant made a Logbook entry at 8:00 PM stating: “*Security check made all appears okay.*”²⁵ Grievant was in the Fitness Center at 8:00 PM. This is a falsification of records and memorializes a significant lack of duty, a **Group III offense**.

HR testified that she reviewed the evidence presented to her by SM. After doing so, she concurred in the decision to terminate. Her decision was reviewed by her supervisor who also concurred. Finally, the President of the Agency reviewed and also concurred in the decision to terminate.

Grievant testified that he did not realize he needed to be in the room used by the Post Card show. He felt merely being in the building was sufficient. His instructions were to report to the Post Card show, not to the Fitness Center for a workout. Grievant acknowledged that he should have known the policy regarding the use of the Fitness Center.

The Advocate for Grievant argued that all of the charges individually were not sufficient to warrant a Group III termination. In Administrative Ruling 2020-5003, the Director of EDR addressed this issue. The Director stated, “*The outcome of the hearing decision in this case is largely driven by an underlying interpretation of policy by the hearing officer: whether the Grievant’s conduct should be reviewed as individual acts or collectively. The agency took the approach that it would consider the Grievant’s conduct collectively, resulting in a single disciplinary action. The hearing officer has determined that the Standards of Conduct policy does not authorize this approach. However, the hearing officer is incorrect in his interpretation. While the Grievant’s behavior could be viewed as individual acts and, therefore, assessed and disciplined separately, nothing in the policy prohibits the agency’s approach here.*”²⁶

The Director, in a later Administrative Review, reiterated that “*...the agency essentially considered the Grievant’s repeated failure to follow policy in its entirety, resulting in a single disciplinary action. Though the Grievant’s behavior could be viewed as individual acts and therefore, assessed and disciplined separately, nothing in the policy prohibits the agency’s approach here. The resulting charges in the disciplinary action at issue in this case are defined by their totality... and not a collection of unrelated distinct issues of misconduct.*”²⁷

I have found that Grievant committed 2 Group I offenses, 7 Group II offenses and 1 Group III offense. Regardless of whether the Agency brought 10 separate Group Notices or 1 combined Group III Notice, I find the Grievant has committed the Group III offense alleged.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance

²⁴ Agency Exh.1 at 6,7

²⁵ Agency Exh. 1 at 8

²⁶ Administrative Review Ruling 2020-5003, Nov. 10, 2019, at 5

²⁷ Administrative Review Ruling 2022-5291, August 17, 2021, at 5

Hearings (“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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

Grievant’s most recent Employee Work Profile gave an “Overall Rating Earned” of High Contributor.²⁸ That rating was consistent with prior Employee Work Profiles. HR testified that this, along with length of service, was considered in the decision to terminate.

As I have found that (1) Grievant engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, I can only mitigate, if I find under the record evidence, the discipline exceeds the limits of reasonableness. I find that the discipline was reasonable.

I can find no reason for mitigation under the facts presented in this matter.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of a Group III Written Notice with termination for violation of Policy 1.60 was proper.

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.**

²⁸ Agency Exh. 1 at 44

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 OP 445.4 (II)(E) must refer to a particular mandate in state or Agency OP 445.4 (II)(E) with that 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 where 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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: April 13, 2024

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.