

**COMMONWEALTH OF VIRGINIA**  
**Department of Human Resource Management**

**Office of Employment Dispute Resolution**

**DECISION OF HEARING OFFICER**

**In re:**  
**Case Number: 12080**

Hearing Date: April 19, 2024  
Decision Issued: April 24, 2024

**PROCEDURAL HISTORY**

The Hearing Officer was appointed effective February 12, 2024. Upon being appointed, a pre-hearing telephone conference was conducted on February 16, 2024 and the Grievance Hearing was scheduled for April 19, 2024, with a copy of all exhibits a party intends to introduce and a list of witnesses to be called to be provided to the Hearing Officer and to the other party no later than April 12, 2024.

The Agency provided to the Hearing Officer and to the Grievant as required by the Hearing Officer an indexed notebook of exhibits and a list of witnesses to be called, as required by the letter notice. The Grievant did not provide to the Hearing Officer or to the Agency any exhibits or list of witnesses as required by the letter notice.

The Grievant did not appear at the hearing on April 19, 2024 and did not contact the Hearing Officer or the Agency to advise that the Grievant would not be appearing.

The grievance hearing was conducted on April 19, 2024 as scheduled, with the Agency proffering its evidence and the Hearing Officer admitting into evidence the Agency's exhibits 1-16 contained in a single notebook.

The grievance hearing addressed the following Written Notice:

Group III Written Notice issued with termination of employment issued on December 29, 2023 alleging the Grievant violated DHRM Policy 1.60, Standards of Conduct, including unsatisfactory job performance, failure to follow instructions or policy, unauthorized use of state property or records and interference with state operations; violated Virginia Code Section 18.2-152.2 regarding computer invasion of privacy; and violated DMV directive regarding

accessing DMV records for friends, family or co-workers.

## **APPEARANCES**

Agency Party Designee  
Agency's Advocate

## **ISSUES**

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Did the Grievant's conduct constitute a Group III violation under the Standards of Conduct?
3. Whether the Agency considered mitigating and aggravating factors?
4. Was the Written Notice consistent with law and policy?

## **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 Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual (GPM) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

## **EXHIBITS**

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-16.

The Grievant did not appear at the hearing and no exhibits were submitted by the Grievant.

## **FINDINGS OF FACT**

After reviewing the evidence presented in the form of the Agency's exhibits and as proffered by the Agency Advocate, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as an Administrative and Office Specialist III, with the Grievant's employment governed by the following:

- DHRM Policy 1.60 (Standards of Conduct) (Agency Exhibit 3)

- DMV Policies, Procedures and Handbooks set out in Acknowledgement signed by Grievant (Agency Exhibit 6)
- DMV CSC Employee Operational Security Policy and Procedure set out in the Acknowledgement signed by the Grievant (Agency Exhibit 7)
- DMV Information Security Policy (Agency Exhibit 8)
- DMV Directive signed by Grievant on May 16, 2022 regarding accessing DMV records for friends, family or coworkers (Agency Exhibit 9)

The Agency's evidence demonstrated that on November 18, 2023 the Grievant violated DMV Policy and Procedure and the DHRM Standards of Conduct by not following the "Family And Friends Transaction Log Procedures" which require the Grievant to have a manager sign off on any requests brought to an employee by another employee to disclose DMV records.

In addition, the Agency Exhibits included a statement by the Grievant dated December 18, 2023 in which the Grievant stated in part:

"I liked to start by wholeheartedly apologizing for my misconduct on that day... there is no excuse for it...I acknowledge that I was in the wrong and would accept a proper punishment as seen fit for me."

The Agency evidence demonstrated that the Grievant's conduct resulted in a person's DMV confidential information being disclosed without that person's consent. The Agency's evidence showed that the Grievant's conduct was not only a violation of DMV Policy and Procedure but was a criminal action under Virginia Code Section 18.2-152.5. Computer invasion of privacy (Agency Exhibit 4).

The Agency proffered the testimony of N.D., CSMA Director, Customer Service Management -Richmond and the testimony of H.S., Employee Relations/EO Senior Specialist, Human Resources both of whom would testify that in every Group III case involving conduct similar to the Grievant's, the employee was always terminated. The testimony of the two witnesses would be that the invasion of privacy and disclosure of confidential information from DMV records is of the most serious nature and discipline (termination) is never mitigated.

## CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination." (Standard of Conduct)



Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource Management...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the assessment of any mitigating and aggravating circumstances. 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 Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

After reviewing all of the Exhibits, and the proffered testimony, the Hearing Officer concludes as follows:

- 1. The Agency proved by a preponderance of the evidence that the Grievant violated all of the cited policies and procedures and that such violation was a Group III violation, all as set out in the Group III Written Notice (Agency Exhibit 2).
- 2. The Agency proved by a preponderance of the evidence that the Group III Written Notice with termination should not be mitigated due to the serious nature of the misconduct which could seriously impact the public's faith in the Agency protecting the public's confidential information.
- 3. The Group III Written Notice is consistent with law and policy.

## DECISION

For the reasons stated herein, the Agency's Group III Written Notice with termination of employment is upheld.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resources 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.

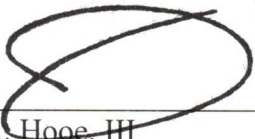
You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]  
[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an

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

EEDR Consultant].

ENTERED: 4.24.24  
Date

  
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John R. Hooe, III  
Hearing Officer