

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

**DECISION OF HEARING OFFICER**

**In re: EDR Case Number 12107**

Hearing Date: May 13, 2024  
Decision Date: June 11, 2024

**PROCEDURAL HISTORY**

Grievant was an employee of the Department of Wildlife Resources ("Agency") with the job title of Scientist II-Fisheries Biologist at Agency Facilities. Grievant timely filed a grievance to challenge the Agency's disciplinary action by submitting the Grievance Form A on March 18, 2024, from a dismissal date of February 23, 2024. Grievant's Form A requested relief of "...retired early by DWR...full health benefits...all back pay and benefits restored from my termination date forward...my record cleared of all offenses...MB and CM issue a full apology to all staff... if retirement is not an option, I would like my full job, benefits, fully restored [with]... another chain of command".

The Facility written notice, issued February 23, 2024 stated a Group I offense of #13 -Failure to follow instructions or policy, with an offense date of 12/28/2023 and an active Group III notice on file issued 06/30/2021 with the disciplinary action of Termination. That written notice also stated at Section IV- Circumstances considered that "Per DHRM Policy 1.60 Standards of Conduct an employee who is issued a Written Notice that would normally warrant termination but who is not terminated due to mitigating circumstances should be notified that any subsequent Written Notice for any level offense during the active life of the Written Notice may result in termination".

EDR appointed the undersigned as the Hearing Officer ("HO") effective April 8, 2024.

A telephone Prehearing Conference was held on April 11, 2024, with participation by the Grievant's attorney representative, the Agency attorney representative, and the Hearing Officer. At that conference the agreed upon hearing location, date, and time were set, with the option for witnesses of either party to testify virtually. Exchange of exhibit lists, exhibits, and witness lists, with the option of electronic exchange, was set for five calendar days prior to hearing, by agreement of the parties and the HO.

The parties agreed they would cooperate in document production, with the option to request the HO order production of appropriate documents; however no such HO order was requested by either party. The parties were informed that all submissions and communications be copied to the HO and the other party.

On May 13, 2024, a hearing was held at the agreed upon location, the Agency's office, commencing at the agreed upon time.

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## APPEARANCES

Grievant

Grievant's attorney representative

Agency's attorney Representative

Agency representative

Witnesses( 3 for Agency) (5 for Grievant)

## ISSUES

1. Whether Grievant engaged in the behavior described in the written Notice?
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 of so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

## 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 raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows what is sought to be proved is more probable than not. (GPM§ 9).

## FINDINGS OF FACT

All proposed exhibits submitted by either party were admitted without objection, as relevant and material. After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant has been employed at the Facility with a Role Title of Scientist II-Fisheries Biologist, at a specific Region I placement with a Supervisor.

A. Length of Facility employment was about nineteen years with the Agency and about 26 years with the Commonwealth of Virginia at the time of the Written Notice.

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2. The termination was identified as based on disciplinary prior history of an active Group III notice of 08/30/2021 and the Group I notice of an incident of 12/28/2023.

3. The Grievant did not dispute the termination incident occurrence but disputed the discipline of termination.

4. The prior disciplinary Written Notice of 08/30/2021, upheld at a grievance hearing decision of 01/20/2022, and still active, stated the offense of being absent from work three or more days without authorization. The disciplinary action carried no termination, suspension, demotion, or change of pay, or other sanction. The Agency stated then that the discipline was mitigated, and at this hearing an Agency witness confirmed that mitigation was granted in consideration of Grievant's then situation. (Agency Exhibit 3).

A. Subsequently, Grievant received two written warnings in 2022 regarding attendance and communication issues and supervisor informed that failure to comply with agency policy can result in disciplinary action. (Agency Exhibit 14, page 2).

5. The Agency conceivably could have imposed lesser discipline.

A. The Agency Witness who is Chief of Grievant's department credibly testified that he considered the behavior egregious and a worst case of fabrication, based on his concerns that the behaviors of not getting approval for an item of excessive cost, not following the directions of policy and procedures, not checking SWAM; and the Agency concerns of trust generally and for paperwork accountability within a tight budget.

6. The offense at bar is stated as Group 1:13: failure to follow instructions and/or policy regarding the wader purchase.

7. A supervisor may impose stricter, but not more lenient requirements on their department procedure. Grievant's Region I issued AWD Guidelines of 02/28/2022 which included wader purchase limits, purchase instructions, and SWAM requirements (Agency Exhibits 1 page 14, 10, Credible Agency Witness Testimony).

A. Under the Uniform policy at issue herein, titled "Exceptions", Grievant's Region I, per 2017 DGIF Uniform policy Purchase must follow all appropriate Department and Commonwealth purchasing procedures and requires supervisor approval, [and] May not exceed \$150.00 cap on Special footwear (rubber boots, wader) purchases, unless the supervisor approved a higher amount (Agency exhibit 10, Region 1 AWRD Guidelines updated 02/28/2022), credible Agency Testimony).

A. The Guidelines stated "SPCC purchases over \$1000.00 require documentation of approval from your supervisor attached to receipt". Grievant testified he relied on this provision, but the Hearing Officer finds the stated Exceptions for Wader purchases of \$150.00 is the applicable policy in this case.

9. Grievant did not properly consult his supervisor prior to purchasing waders as instructed, did exceed the spending cap placed on waders purchase without seeking or receiving permission, and failed to follow Agency policies by neither utilizing a SWAM vendor or failing to document circumstances that would preclude using a SWAM vendor. Grievant's waders cost \$754.54, (Agency exhibit 1, page 12, 13). The hearing officer examined the cited purchase order.

10. Grievant testified to reliance on information from other employees that they had purchased waders from the same vendor (herein "VC") at issue, but no other employee provided documentation or testimony that the VC vendor at issue was SWAM. That VC vendor was not SWAM. (Agency exhibit 15:1). Further no witness testified or stated in an exhibit of communication that their purchase did not have supervisor permission to use a non-SWAM vendor (e.g. "... We bought ours from [vendor VC at issue]. I'm not sure if they're SWAM or not but there was nowhere else to buy waders from. We got approved for the purchase [from the vendor VC at issue] for the purchase by [Agency JW]..") (Grievant Ex.8).

11. Grievant had actual notice and experience in the required SWAM obligations and procedures and purchase procedures generally, including receiving a virtual presentation on March 2, 2022 that included purchasing procedure review and budget process update (Agency Ex 11:1).

A. The procedure to determine if a vendor is SWAM is an internet search; a process which is stated in Agency documents (Exhibit 12, page 1 of 10/29/2020). By documentation and credible testimony, Grievant has performed other purchase transactions. (Testimony and Exhibit 13). Agency Exhibit 7 states the requirement; Agency Exhibit 8, 9 shows Agency website illustrated step by step directions and requirements.

B. Grievant has several prior purchase experiences; including getting supervisor approval to purchase work boots in 2022 (Agency exhibit 1:9-11). In Agency Exhibit 12 page 11, Grievant states a SWAM search for office supplies 3/16/ 2023, and was informed on 05/02/23 by the Senior Program Support Specialist "please make sure you do a MICRO SWAM search for the area(s) you plan on making for the purchase- yes you can do a search for your work contact..."

12. Grievant inaccurately and wrongfully stated on his purchase form that the vendor he used was a SWAM vendor, which inaccurate statement removed the regulatory need to document the inability to use a SWAM vendor (Agency exhibit 10, 11, Testimony).

13. Grievant has an Agency lengthy tenure of about nineteen years and 26 years with the Commonwealth of Virginia (Grievant testimony). Grievant's recent performance evaluations were positive in 2020, 2022 and 2023 at the advanced contributor and contributor level (Grievant Ex. 1,2,3).

14. No evidence presented that the Agency discipline was inconsistent with law and policy. Grievant's witnesses and documents identified that other employees made purchasing form errors and none in their knowledge were terminated; but no evidence was presented that these other employees also had an active Group III, or inaccurately affirmed on a purchase form that a non-SWAM vendor was SWAM. ( Grievant Ex. 9, 13, Testimony).

15. By written communications with his supervisor before the waders purchase, Grievant was informed that "...waders can be purchased according to agency purchasing guidelines through either a purchase order or using your SPCC. You should make an attempt to purchase from a SWAM vendor before utilizing a non-SWAM vendor. Please try to keep these items under \$150.00, let me know if you cannot...". Grievant did not so comply. ( Agency Ex. 12 page 8: 12/06/2022).

16. Purchase procedures and guidelines have undergone changes over the years, requiring employees to maintain current requirement information ( Agency Exhibit 12, page 1 of 10/29/2020, Grievant Ex. 5-1 : May 5, 2023).

A. The Agency purchasing administrator testified credibly that s/he processes purchase documents, does not correct errors, will provide guidance if she is available, and returns orders she identifies as faulty to supervisors for correction. That administrator was on leave for part of December 2023.

17. Grievant's supervisor, upon identifying the wader purchase issues, contacted Human Resources ("HR") for guidance as per the recommendation of his superior. The HR Director, upon consideration of the supervisor's information, recommended a Group Written Notice for failure to follow supervisor's instruction and agency written procedures...After holding the pre disciplinary meeting with the employee you may consider mitigating circumstances and reduce the Group written Notice to a Written Counseling if warranted. I agree that the employee should return the boots as they were not purchased within the purchasing procedures provided to staff. While a review of SPCC training is definitely warranted in this situation, you may want to consider a suspension of P-card privileges for a certain period. Granted, I understand this will create additional work for the Regional Support Specialist and you, so it may not be an operationally prudent action..."( Grievant exhibit 9-2) .

A. The supervisor, by email of February 9, 2024 sent a pre-disciplinary notice ("Notice") stating the wader purchase issues, directing wader return, asking for Grievant to review the Written Notice, and provide a written response by February 13, and notify the supervisor of availability for a disciplinary meeting on either February 15 or 16. ( Agency exhibit 11, page 11). Grievant did not provide a response to that Notice and testified in effect that he misunderstood the instructions ( Supervisor-Witness and Grievant testimony).

18. Grievant did return the waders at issue, by credible witness testimony.

## CONCLUSIONS OF POLICY

1. DHRM: Employee Offenses: Unacceptable behavior is divided into three types of offenses, according to their severity, as per the Virginia Department of Human Resource Management ("DHRM") Attachment A: Policy 1.60;

Group I offenses "...include acts of minor misconduct that require formal disciplinary action...For repeated Violations of the same offense, an agency may issue a Group II Notice if the employee has an active Group I Written Notice for the same offense in his/her personnel file..."

Group II offenses " include acts of misconduct, violations of policy, or performance of a more serious and/or repeat nature that significantly impact the agency's services and operations ...Examples may include...failure to comply with written policy or agency procedures...Second Offense: discharge or in lieu of discharge the Agency may Suspend...demote...or transfer...Absent mitigating circumstances, discharge may occur for accumulations as follows...Two Group II level offenses..."

Group III offenses " include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination". If the employee is not discharged upon the issuance of the Group III Level of offense. The employee should be advised tht ny subsequent Written Notice occurring during the active life of the Group III may result in discharge..."

2. DHRM Policy 1.60 Employee Standards of Conduct : "...Perform assigned duties and responsibilities with the highest degree of public trust. Devote full effort to job responsibilities during work hours Use safe equipment, time, and resources judiciously and as authorized. Support efforts thatt ensure a safe and healthy work environment...Demonstrate respect for the agency and towards the agency coworkers, supervisors, managers, subordinates..."

A."... Counseling is provided by a supervisor or manager in the employee's reporting structure and is typically the first level of corrective action but is not a required precursor to the issuance of a Written Notice.

B. When counseling has failed to correct misconduct or when an employee commits a more serious offense, management should address the matter by issuing a Written Notice.

C Aggravating Factors...[include actions that] damages the credibility and reputation of the agency..."

3. Virginia Code Ann. §2.2-4310 (B): requires that " All public bodies shall establish programs consistent with this chapter to facilitate the participation of small businesses, businesses owned by women, minorities, amd service disabled veterans and employment services in procurement transactions [SWAM]. The programs established shall be in writing...[and] submit annual progress reports....cooperate with [state] annual review...[and] shall update such programs to incorporate any feedback and suggestions..."

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4. Agency Policy- Purchasing Guide F.Y. 2021: Includes SWAM and eVA policies requirements and exceptions as well as other purchasing requirements including credit cards; and provides user instructions ( Agency Exhibit 9).

5. Facility Region I AWRID Policies: ( Agency Exhibit 10). [Grievant's Region].

A. Regarding waders, "Purchaser must follow all appropriate Department and Commonwealth purchasing procedures sand requires supervisor approval...May not exceed \$150.00 Periodicity: as needed.

B. Regarding SPCC [ small purchase credit card] /Purchase Requests/Voyager Policy."...Utilize a MICRO/SWAM vendor whenever possible. If you do not utilize a MICRO/SWAM vendor , provide documentation explaining the circumstances attached to BOA/Asset Document form..."

C. Leave Policy (DHRM Policy 4.30 Emergency leave requests should be submitted as far in advance as possible. Email your supervisor and submit into TAL if there is time. If not, submit retroactively..."

### MITIGATION

The Grievant requests mitigation of the discipline of termination, based on having followed his training, always previously following state policy for purchases, communicated with others who had purchased the waders from the same vendor, and that other similarly situated employees have broken policies during purchasing and not been disciplined.

The EDR Administrative Review Ruling Number 2024-5620 dated November 15, 2023 stated " By statute, hearing officers have the power and duty to [r] eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by by [EDR]. The Rules for Conducting Grievance Hearing ("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 ". More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described on 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.(§VI B). Because reasonable persons may disagree over or whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment for that of agency management. Indeed, the "exceeds the liits of reasonableness" standard is high. EDR, in turn will review a hearing officer's mitigation decision for abuse of discretion, and will reverse the determination only for clear error..."

The Rules state that "In making such [mitigation] decision, the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility, managerial judgement has been properly exercised within the tolerable limits of reasonableness..." ( Rules VI (B)(2).'

The hearing officer acknowledges that Grievant is an employee of lengthy duration and was otherwise competent in performing his employment duties.

Based on the facts of the case, and when considering the proffered mitigating factors, Grievant did not establish mitigating circumstances justifying a reduction or removal of the disciplinary action at issue herein, and the Grievant did not meet the burden of establishing that the agency abused its discretion.

### CONCLUSION

The Hearing Officer finds that, by a preponderance of the evidence, under the facts in this case and the applicable regulatory standards, stated herein, that the Grievant engaged in the behavior described in the written notice, that the behaviors at issue constituted misconduct, significantly impact the agency's services and operations, and that the Agency's discipline was consistent with law and policy. The Grievant violated Agency and department regulation and policy regarding obligatory research and identification of vendor SWAM status, which requirement adheres to a Virginia law; falsely stated the vendor's status as SWAM thus removing his obligation to justify the use of a non-SWAM vendor; did not seek or obtain supervisory approval to exceed the cost limit of the purchase; did not submit justification for using a non-Swam vendor, and has an active Group III Notice where mitigation was provided.

Further, the Grievant was both trained and experienced in the correct procedures and policies; with the further knowledge that policies and procedures were subject to change, thus obligating him to keep abreast of updates. Additionally, Grievant did not implement offered pre disciplinary rebuttal opportunity procedures. Aggravating factors include the existence of Grievant's active Group III where mitigation was applied, two subsequent warnings regarding conduct, a materially false purchase statement, the negative affect on the trust afforded to the Grievant by said misconduct and the Agency's loss of trust in and disruption to the Agency's services and operations by that misconduct.

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EDR Administrative Review Ruling Number 2023-5432 states " the useful model of the federal Merit System's Protection board for EDR hearing officers that "prohibits interference with managements judgment unless, under the particular facts, the discipline imposed is 'so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion...but may mitigate discipline where ' the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the limits of reasonableness ' ( cited case law omitted)".



Thus, the Hearing Officer finds no mitigating circumstances justifying a reduction or removal of the disciplinary action. Therefore, the Agency had proper cause to terminate the Grievant's employment under the applicable criteria, and the Hearing Officer will not substitute her judgement for the Agency decision to terminate Grievant based on the factors stated.

### DECISION

For the reasons stated above, the Agency's issuance to the Grievant of the action of Termination is **upheld** based on a Group I offense with an active Group III disciplinary notice and prior mitigation.

### 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> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

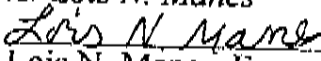
or send by email to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov) or by fax to (804)786-1606.

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 day calendar day period has expired or when requests for administrative review have been decided.

A challenge that the hearing officer decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing officer decision is not in compliance. A challenge that the hearing officer 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. Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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].

/s/ Lois N. Manes  
  
Lois N. Manes, Esq.  
Hearing Officer