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. 12119

Hearing Date: June 3, 2024
Decision Issued: June 5, 2024

PROCEDURAL HISTORY

On March 22, 2024, Grievant was issued a Group II Written Notice of disciplinary action, with job termination. The offense was failure to follow instructions or policy and abuse of state time, occurring on various dates between February 29, 2024, to March 13, 2024.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 15, 2024, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On June 3, 2024, a hearing was held in person, the first date mutually available for the parties.

The Agency submitted documents that were accepted into the grievance record, and they will be referred to as Agency Exhibits, by lettered tab. The Grievant did not submit separate exhibits. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

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 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."

DHRM Policy 1.60, *Standards of Conduct*, requires employees (among other things) to:

- Perform assigned duties and responsibilities with the highest degree of public trust.
- Devote full effort to job responsibilities during work hours.
- Meet or exceed established job performance expectations.
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Comply with the letter and spirit of all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations.
- Work cooperatively to achieve work unit and agency goals and objectives.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. G.

Under DHRM Policy 1.60, a Group II offense includes acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses 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, or laws. The *Standards of Conduct*, Agency Exh. G.

The Offense

The Group II Written Notice, issued by the Grievant's supervisor on March 22, 2024, detailed the facts of the offense, and concluded:

> This Group II Written Notice is being issued for violating DHRM policy 1.60 - *Standards of Conduct for failure to follow supervisor's instructions, failure to comply with written policy/agency procedures, and abuse of state time.*
>
> You were verbally counseled on January 12, 2024, and January 18, 2024, regarding the ongoing usage of your cell phone throughout the day and expectations to use your personal cell phone only during the morning break, lunch time and afternoon break. During these counseling sessions, I conveyed that your usage was impacting the quality of your work, and your performance was declining as you were making errors and rework was necessary. Personal cell phone usage was also discussed at the January 24, 2024, staff meeting. [The State

Sign Shop Manager] advised all of the staff of the policy on personal cell phone usage and his expectations of usage during breaks and for emergency situations. On February 21, 2024, you were issued a written counseling letter addressing these same concerns due to your continuous usage of your cell phone throughout the day.

It was also shared previously with you that the VDOT Employee Handbook, specifically states that "Personal use should be minimal and infrequent. Usage that interferes with normal business activities or is for personal economic benefit (including conducting outside business for profit), is strictly forbidden at all times. Lengthy or frequent personal phone calls, including those made on personal devices, may constitute an abuse of work time, and may result in disciplinary action." Your actions are violating this standard, and they also violate Department of Human Resources Management (DHRM) Policy 1.60 *Standards of Conduct* which include minimal expectations for employees to Include:

- Perform assigned duties and responsibilities with the highest degree of public trust
- Devote full effort to job responsibilities during work hours.
- Comply with the letter and spirit of all state and agency policies and procedures, the Conflict-of-Interest Act, and Commonwealth laws and regulations
- Meet or exceed established job performance expectations.

Since the issuance of the written counseling letter on February 21, 2024, I have continually witnessed you using your personal phone during work hours and outside of break times as directed. Dates include February 29th; March 15th; March 4th; March 6th; March 7th, and March 8th, March 11th and March 13th.

ln addition, on March 7, 2024, I witnessed you taking a break at 9:50 am which was 10 minutes earlier than the set schedule. You then left the VDOT premises and did not return to work until 10:15 am. Soon after at 10:32 a.m. I could hear you on your phone again.

On March 8, 2024, at 2:50 pm while walking the production floor with another supervisor, I witnessed you scrolling pictures on your phone for several minutes before you realized I was standing there. Upon my inquiry of whether there was an emergency, you became defensive and said there was nothing left to do prior to leaving for the day at 3:30 pm. You conveyed that nobody else was working which was untrue.

Agency Exh. A. The discipline included job termination, based on accumulated discipline including an active Group III Written Notice. For circumstances considered, the Written Notice stated:

> You were issued Due Process on Friday, March 15, 2024, and given an opportunity to respond by Monday, March 18, 2024. However, no response was received. You received a Group Ill Written notice on October 12, 2023, for violating Department of Human Resource Management (DHRM) Policy 1.60 - *Standards of Conduct* as it related to falsifying time/leave records; failure to report without notice and failure to follow instructions/policy. You were advised at the time of issuance that further infractions/violations would result in additional disciplinary action up to and including termination. Based upon the cumulative nature of these infractions and no mitigating factors identified to reduce the level of this Group II discipline, your employment with VDOT is being terminated effective March 22, 2024.

Agency Exh. A.

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 sign fabricator in the sign shop.

The Agency's witnesses, including the Grievant's supervisor, the production supervisor, and the general manager, testified consistently and credibly with the offense noted in the Written Notice. They also had contemporaneous notes supporting their observations of the Grievant's conduct. Agency Exh. E. The supervisor testified that employees are permitted to use one ear bud to listen to music while working. Use of only one ear bud is for safety reasons. The active Group III Written Notice was mitigated to exclude job termination. The general manager testified that he observed the misconduct and the Grievant's productivity has decreased significantly with his increased cell phone misuse.

The Grievant testified that he was singled out since other employees are allowed to use one ear bud to listen to music while working—necessarily using their cell phones to do so. The Grievant testified that his decline in production was attributable to his family and health issues—not the use of his cell phone.

The Grievant noted in his grievance that he was alleging harassment and discrimination. Other than his broad statement that he believed he was being singled out, the Grievant presented no evidence of harassment, discrimination, or disparate treatment.

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 by a preponderance the misconduct and that the offense is properly a Group II Written Notice. Accordingly, I find that the Agency has met its burden of showing the Grievant's misconduct as charged in the Written Notice. Therefore, unless otherwise mitigated, I find that the Group II discipline is consistent with policy.

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 the frequency of the conduct and associated production decline were significant.

Given the nature of the Written Notice, as decided above, I find no evidence or circumstance that allows the hearing officer to reduce the discipline. The agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of a Group II Written Notice must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

With an active Group III Written Notice, job termination is the permitted disciplinary action for this Group II Written Notice. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. There is no evidence of another situation or similar offense treated differently. This was not a situation outside the Grievant's control.

Under the *Rules*, 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 he lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

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).

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 extent of the disciplinary action. There is no evidence of disparate treatment or a retaliatory motive for the level of discipline. 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, I lack the bases to reverse or mitigate the Agency's Group II Written Notice. Thus, the Group II Written Notice, with job 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.

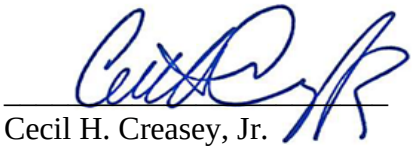
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.