



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12022

Hearing Date: February 5-6 and 22, 2024

Decision Issued: March 12, 2024

PROCEDURAL HISTORY

On September 11, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination.¹

On October 2, 2023, Grievant timely filed a grievance to challenge the Foundation's action. The matter advanced to hearing. On October 16, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On February 5-6, 2024, a hearing was held at an office building in downtown Richmond, Virginia. At the request of the Grievant and without objection from the Foundation, the Hearing Officer left the record open and took testimony from one witness on February 22, 2024. Both parties also presented closing arguments on February 22, 2024.

APPEARANCES

Grievant
Grievant's Counsel
Foundation Counsel
Foundation Counsel
Witnesses

¹ Agency Ex. at 285-287, Grievant's Ex. Tab 9 at KB 000134-000136.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
2. Whether the behavior constituted misconduct?
3. Whether the Foundation'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

The burden of proof is on the Foundation 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 that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Foundation is charged with administering a Fund, including providing funding for certain programs and services and accepting and raising revenues to support the Fund. The Foundation is governed and administered by a Board of trustees whose members are volunteers.

By statute, the role of the Executive Director of the Foundation is to direct the day-to-day operations and activities of the Foundation and carry out the powers and duties conferred upon her by the Board. The Executive Director shall also exercise and perform such other powers and duties as may be lawfully delegated to her and such powers and duties as may be conferred or imposed upon her by law. The Board exercises personnel authority over the Executive Director.

By statute, the Foundation also receives support services from another agency, the Department.

Prior to her dismissal, Grievant served as the Executive Director for the Foundation (or Agency). Grievant had served in that role for more than 6 years. For most of the time that Grievant was employed by the Foundation, Grievant was the Foundation's only employee.

The only available Employee Work Profile for Grievant's position appeared to be from January 2017. The Employee Work Profile described the purpose of the position as:

manages and promotes the Foundation and supports the programs of [the Department]. The Executive Director manages a statewide program to accept and raise funds to support [programs and services] and supervises the distribution of such funds as directed by the Foundation Board of Trustees and its Chairman. The Executive Director serves as the Board's principal staff support and is responsible for duties and tasks assigned to the Foundation as the Board's agent. . . . The Executive Director is responsible for ensuring that the Foundation performs its mission to administer the [Fund] provide funding for [programs and services] through the Fund, and accept and raise revenue from all sources including private source fundraising to support the Fund. . . .²

The 2017 Employee Work Profile included the following Core Responsibilities: Carries out Foundation Operations (30%), Supports the Foundation Board of Trustees (20%), Responsible for Foundation Fundraising Management (20%), Provides Administrative Oversight of [Fund] Activities (5%), Support Foundation Planning and Policy (15%), Support Foundation Operations (5%), Other Duties (5%).³

In February 2020, the then-current Board chairman provided Grievant with a performance evaluation with an overall rating of "Strong Contributor."⁴

In July 2022, the Board elected a new Board Chairman.

The Board Chairman issued to Grievant a Notice of Improvement Needed/Substandard Performance dated November 4, 2022.⁵ Grievant did not respond to the Board Chairman regarding the Notice of Improvement Needed/Substandard Performance. On November 7, 2022, Grievant sent a response to the Cabinet Secretary, an ex-officio member of the Board, in which she also alleged that she had been subjected to harassment and bullying by the Chairman.⁶

The Cabinet Secretary requested that the Department of Human Resource Management (DHRM) investigate Grievant's allegations. DHRM reported its findings to the Cabinet Secretary by memorandum dated January 23, 2023.⁷ The memorandum concluded that

. . . a review of the relevant information does not support a finding of harassment or hostile work environment as defined in relevant case law. However, it is clear from this review that [Board Chairman] and the Board

² Grievant's Ex. at Tab 1, KB000063-KB000073.

³ Grievant's Ex. at Tab 1, KB000063-KB000073.

⁴ Grievant's Ex. at Tab 1, KB000076-KB000079.

⁵ Grievant's Ex. at Tab 2, KB000107-KB000108.

⁶ Grievant's Ex. at Tab 2, KB000109-KB000111.

⁷ Grievant's Ex. at Tab 2, KB000112-120.

are dissatisfied with [Grievant's] level of performance at this time. We have attempted to identify areas where improvements to communication and expectations could be beneficial. At the end of the day, the [Board] needs to be clear with [Grievant] about what they expect of her. If [Grievant] has questions about any expectations, she should clarify with [Board Chairman] or the Board as may be appropriate. If [Grievant] fails to meet expectations for clearly conveyed, reasonable directives, then she should be appropriately held accountable for any deficiencies. However, there can be a fine line between providing clear expectations and micromanagement. We would encourage [Board Chairman] and the Board to be cautious and avoid focusing on every minor performance issue that may arise – unless the concerns are recurring – and focus on the critical tasks ahead, such as fundraising. Likewise, [Grievant] should be encouraged to identify any areas in which she needs support so that training, for example could be provided, especially if additional personnel are not available for [Foundation] to hire.

As stated before, for purposes of this memo, we assumed that [Grievant] is in a classified position. Therefore, to the extent she is held accountable for her performance, the procedures to follow should be consistent with those available to classified employees. [Board Chairman] should reach out to [Department's human resources office] for any guidance needed in that regard. If the Board should choose to revisit [Grievant's] status as a classified employee and the options available, both the [Office of the Attorney General] and DHRM's Policy Administration team should be consulted for guidance.⁸

Grievant testified that at some point early in 2023, she engaged counsel to represent her in legal matters related to her employment with the Foundation.

During the Spring of 2023, the Board was reviewing its options with respect to Grievant's status as a classified employee.

As early as May 18, 2023, the Foundation's counsel asked Grievant's counsel by email to advise Grievant to adhere to a litigation hold to preserve documents, including emails and texts.⁹

On June 7, 2023, the Foundation's counsel and the Grievant's counsel were exchanging emails regarding potential mediation between the parties. As part of that exchange, the Foundation's counsel again instructed Grievant through her counsel to "refrain from deleting any emails, texts, or documents."¹⁰

On June 20, 2023, the Department's Human Resources Director, HR Director, requested that Grievant meet her at the Department's offices. When they met, HR

⁸ Grievant's Ex. Tab 2 at KB000120.

⁹ Agency Ex. at 289-290, Grievant's Ex., Tab 9 at KB 000134-000136.

¹⁰ Agency Ex. at 299-300.

Director provided Grievant with a letter dated June 16, 2023, from the Chairman of the Board. The letter advised Grievant that

[t]he Executive Committee of the [Foundation Board] has elected to place you on Pre-disciplinary Leave with Pay effective immediately. This action is being taken while the Board considers the structure of the Foundation and does not imply disciplinary action is involved (the Commonwealth uses this code in the HR system to indicate an employee is not working but on a paid status, as there is no “Administrative Leave” that exists). This action will have no impact on your Annual Leave balances or benefits, and you will continue to receive pay until further notice.

Please submit your employee ID badge, state-issued devices (i.e. laptop, mobile phone, etc.), and any other state-issued items to [HR Director], today. During this time on paid leave, you are still considered an active employee of the Commonwealth and the [Foundation], and may be contacted for agency business, for which you are expected to respond appropriately.

Questions regarding this action should be directed to your legal counsel.¹¹

Grievant advised HR Director at that time that her understanding of discussions between her counsel and Foundation counsel was that she was not going to be placed on pre-disciplinary leave and that the parties were going to enter into mediation. Grievant did not surrender her State-issued property, including a laptop computer and cellphone, among other things, to HR Director on June 20, 2023.¹²

On June 21, 2023, in an email exchange with Grievant’s counsel, the Foundation’s counsel directed Grievant to make arrangements to turn over her State-issued electronic devices.¹³

The parties appeared to have agreed to enter into mediation and, on June 22, 2023, in an email exchange with Grievant’s counsel, the Foundation’s counsel once again directed Grievant to make arrangements to turn over her State-issued electronic devices.¹⁴

On June 23, 2023, the Foundation’s counsel noted that Grievant still had not surrendered her State-issued property and again instructed Grievant through her counsel “not to delete any work related emails, texts, documents, or agency/donor contact information on the equipment.”¹⁵

Between June 20, 2023, and June 26, 2023, while Grievant had possession of her State-issued laptop computer, Grievant testified that she “cleared” computer files and

¹¹ Agency Ex. at 288.

¹² Agency Ex. at 288, 298-299; Hearing recording (day 2) at 10:35-12:03.

¹³ Agency Ex. at 297.

¹⁴ Agency Ex. at 295-296.

¹⁵ Agency Ex. at 294.

documents from the computer. Grievant also admitted that she emailed information from her Foundation email account to her personal email address, including donor information.¹⁶

Grievant met HR Director on June 26, 2023 and turned over her State-issued items, including a laptop computer and cellphone.¹⁷ Consistent with Department practices, HR Director turned over Grievant's State-issued laptop computer and cellphone to the Department's Information Technology staff on the same day she received them from Grievant.¹⁸ The Department's Chief Technology Officer, Department-CTO testified that his office had possession of Grievant's computer after HR Director provided it to them and until he provided the computer to the Foundation's counsel. Department-CTO did not log onto Grievant's laptop computer or access files from her computer while the computer was in his possession.¹⁹

After Grievant was placed on pre-disciplinary leave, Board Member C began working for the Foundation as a part-time, wage employee.²⁰ Board Member C's job was to perform necessary clerical work and to assist the Board while Grievant was on pre-disciplinary leave. Board Member C testified that after he began working part-time for the Foundation, the Department's information technology staff provided him with access to Grievant's Foundation email account, the Foundation's shared network drive, and a flash drive with information to allow him access to the donations database.²¹ Board Member C testified that he began reviewing Grievant's email inbox to "find out what was going on with the Foundation." When Board Member C began reviewing the emails, he noticed that he could not find many current emails. Board Member C then reviewed the "deleted" emails folder in Grievant's email account and found what he described as a significant number of emails.²² Board Member C testified that three of the emails he found in the "deleted" emails folder in Grievant's email account caused him concern because the emails contained donor information, including individual and company names, mailing addresses, employee contacts and email addresses. According to Board Member C, the emails had been forwarded to a personal email account and then had been "deleted," but remained in the "deleted" emails folder because items in the "deleted" folder had not yet been permanently deleted.²³

On July 17, 2023, after retrieving Grievant's State-issued laptop computer from Department-CTO, the Foundation's counsel delivered Grievant's State-issued laptop to the Computer Forensic Unit of the Office of the Attorney General. Between July 18, 2023 and August 15, 2023, Director-OAGCFU conducted a forensic analysis of the laptop. Director-OAGCFU prepared a report²⁴ of his findings dated August 16, 2023. The summary of the report noted:

¹⁶ Hearing recording (day 2) at 5:00:22-5:01:36, 5:05:36-5:08:24, 5:47:35-5:48:25, 5:50:12-5:52:01.

¹⁷ Hearing recording (day 2) at 12:03-12:21.

¹⁸ Hearing recording (day 2) at 12:03-13:05.

¹⁹ Hearing recording (day 3) at 7:09-12:03.

²⁰ Hearing recording (day 1) at 2:30:44-2:31:12.

²¹ Hearing recording (day 1) at 2:32:34-2:35:17, 3:36:50-3:27:56, 3:28:34-3:31:46.

²² Hearing recording (day 1) at 2:35:23-2:36:14.

²³ Hearing recording (day 1) at 2:36:31-2:40:14.

²⁴ Agency Ex. at 1-260, see also hearing recording (day 1) at 5:59:28-6:04:36.

- 147 files deleted with the date of 6/20/2023
- 5,245 files deleted with the date of 6/25/2023

Director-OAGCFU testified that the computer files that had been deleted were not on the laptop, but that the forensic analysis allowed him to see a listing of the names of the computer files that had been deleted from the computer.²⁵

Director-OAGCFU testified that at some point he also was provided with a flash drive to review. Director-OAGCFU testified that his recollection was that the flash drive contained approximately 200 files.²⁶

On September 7, 2023, during a closed meeting of the Board, the Board voted to issue a Group III written notice of disciplinary action with termination to Grievant.²⁷

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."²⁸ 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."

DHRM Policy 1.60 Standards of Conduct provides that "[A]gencies may address multiple offenses through the issuance of one or more Written Notices."²⁹

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

The evidence showed that while Grievant had access to her Foundation email account, she, without authorization, emailed Foundation donor information from that account to her personal email and then deleted the emails she had sent to herself.³⁰ Grievant testified that she sent the information to herself to make it available for her use in her anticipated mediation with the Foundation. Grievant argued that the donor information she emailed to herself was not confidential because the information was

²⁵ Hearing recording (day 1) at 6:02:17-6:03:40, 6:16:01-6:16:32.

²⁶ Hearing recording (day 1) at 6:03:57-6:04:12.

²⁷ See Agency Ex. at 285-287, Grievant's Ex. Tab 9 at KB 000134-000136. See also, Agency Ex. at 270-271. Six members of the Board voted to issue the Group III written notice, with termination, to Grievant; two members voted no and two members abstained from the vote.

²⁸ The Department of Human Resources Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

²⁹ DHRM Policy 1.60, Standards of Conduct.

³⁰ Hearing recording (day 2) at 5:00:22-5:01:36, 5:47:35-5:48:25, 5:50:12-5:52:01, and see Hearing recording (day 1) at 2:35:23-2:38:32.

frequently shared with the Board's Finance committee members.³¹ Grievant's argument is not persuasive. There is no indication that Grievant was authorized to share or use the Foundation's donor information for non-business purposes, including the anticipated mediation. The fact that Foundation Finance committee members, as part of their work for the Foundation, received information about the Foundation's donors does not make that information any less confidential. This Hearing Officer found Board Member C's assertions that the Foundation considered its donor information and files to be confidential and valuable to Foundation's operations to be credible and consistent with the purpose and focus of the Foundation to raise money for the Fund.³²

The evidence showed that while Grievant had possession of her State-issued laptop computer, 147 computer files were deleted from the laptop on June 20, 2023 and 5,245 computer files were deleted from the laptop on June 25, 2023. Grievant admitted that she "cleared" her laptop computer of documents and files before returning it to the Foundation on June 26, 2023, even though she had received instruction from the Foundation, through counsel, to not delete emails, text, or documents from the equipment.³³

Grievant argued that it was a "common practice" among state employees leaving an agency to "clear" their computers. Whether deleting computer files was a "common practice" among other state employees or not, with respect to the Foundation's only employee, Grievant, the Foundation had made clear that it valued the files, documents and emails on the equipment the Foundation had provided to Grievant when it instructed Grievant "not to delete any work related emails, texts, documents, or agency/donor contact information on the equipment."³⁴

Grievant argued that she did not "maliciously" delete Foundation files from her computer. Whether Grievant's intent was malicious or not, Grievant admitted that she intentionally "cleared" her computer and did so after she had been instructed not to delete files and documents from her equipment. Grievant argued that the files were not destroyed because, according to Grievant, they were backed up on a flash drive that Grievant asserted she had left in her office. Grievant's argument is not persuasive. Grievant admitted that she did not seek clarification of the instruction regarding deleting emails or documents from her State-issued equipment or any other confirmation that backing files up to a flash drive was an acceptable substitute for maintaining the files in place on the equipment prior to her deletion of more than 5,000 files from her State-issued laptop computer.³⁵ There also was no evidence to suggest that Grievant had the flash drive with her to back-up the more than 5,000 files on her State-issued laptop computer before she deleted those files. Grievant did not provide a flash drive containing the more than 5,000 files to HR Director when she surrendered the State-issued equipment to HR Director. There was no evidence to suggest that Grievant made HR Director or anyone at the Foundation aware of the flash drive as an additional piece of equipment assigned to Grievant when Grievant surrendered her State-issued equipment on June 26, 2023.

³¹ Hearing recording (day 2) at 5:05:36-5:08:24, 5:50:08-5:52:16.

³² Hearing recording (day 1) at 2:38:32-2:40:15, 2:41:30-2:43:30.

³³ Agency Ex. at 294.

³⁴ Agency Ex. at 294.

³⁵ Hearing recording (day 2) at 5:49:12-5:49:59.

Grievant appeared to argue that it was possible for the Foundation to recover the files that Grievant had deleted from her State-issued laptop computer. Department-CTO, however, credibly testified that files saved to Grievant's laptop, rather than a shared network drive, were not backed-up as part of the State information technology system.³⁶ Department-CTO testified that files that Grievant saved to a shared drive would have been backed up as part of the State system and were still available. Department-CTO also testified that he reviewed the files on the shared drive to which Grievant had access and found approximately 3000 files from the years 2016, 2017 and 2020.³⁷ There was no evidence to suggest, and Grievant did not argue, that any of the approximately 3000 files from the years 2016, 2017 and 2020 were copies of any of the more than 5,000 files deleted by Grievant.

Grievant also appeared to argue that the Foundation could recover the information Grievant had deleted from the State-issued laptop in the same manner that saved files might be recoverable following an unexpected computer "crash." This assertion by Grievant, however, also was unsupported by the credible testimony of Department-CTO.³⁸ Even if the Foundation, with time and expense, could recover the information deleted by Grievant, that possibility would not excuse Grievant's misconduct of deleting the files.

Grievant mentioned that she kept paper files stored in her office and in a cubicle assigned to the Foundation, but did not argue, and there was no evidence to suggest, that the paper files stored in the office were copies of the information deleted from the laptop.

Grievant argued that the Foundation's financial records that she deleted from her State-issued laptop computer were "copies" of documents which were provided to her by the Department. Grievant appeared to rely on the testimony of Former Board Member S who testified that the Department maintained the Foundation's financial information in the State's accounting system, Cardinal. According to Former Board Member S, the Department provided reports of that information to the Foundation, including the Grievant and Foundation board members. Former Board Member S testified to his belief that any financial information that had been deleted from Grievant's laptop computer could be retrieved from, or recreated by, the Department.³⁹ That some of the files deleted by Grievant could, with time, be sufficiently identified to be re-created or re-retrieved from the Department, does not relieve Grievant of her misconduct of deleting the files.

The preponderance of the evidence shows that Grievant engaged in misconduct when she forwarded confidential Foundation donor information from her Foundation email account to her personal email account and when she deleted more than 5,000 files from her State-issued laptop computer.

³⁶ Hearing recording (day 3) at 17:47-19:05, 22:19-25:01.

³⁷ Hearing recording (day 3) at 25:01-27:01.

³⁸ See Hearing recording (day 3) at 17:47-19:05, 22:19-25:01.

³⁹ Hearing recording (day 2) at 2:05:30-2:08:19.

Whether the Agency's discipline was consistent with law and policy

Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; indicate significant neglect of duty; result in disruption of the workplace; or other serious violations of policies, procedures, or laws.⁴⁰

Destruction of State property or records is a Group III offense.

Grievant was the Executive Director of the Foundation and, at the time of her dismissal, the Foundation's only employee. As such, the information and documents that Grievant maintained on her State-issued laptop computer were valuable to the Foundation and its operations. Grievant was specifically instructed not to delete any documents from her State-issued equipment, yet, contrary to that instruction, Grievant deleted more than 5,000 files. Based on the information available from the forensic review of the laptop computer, the deleted files included a variety of file types, including Word documents, PowerPoint presentations, portable document format (.pdfs) and excel spreadsheets.⁴¹ Based on the nomenclature used to identify those files, they appear to have included information about Foundation marketing materials and templates, Foundation donor lists and information and financial records, among other materials that would be significant to Foundation operations.⁴²

Grievant argued that her misconduct did not significantly impact Foundation operations or cause actual harm to the Foundation. Grievant's argument is not persuasive. In this case, Grievant was the Executive Director of the Foundation and its sole employee. Grievant's Foundation work product, correspondence, donor files and other documents by their nature would have been significant and material to the operations of the Foundation. To the extent Grievant argued that the Foundation has not identified the deletion of a specific document or information as specifically harmful to the Foundation's operations, the Foundation's inability to do so rests solely with Grievant and her misconduct which made the files and their content unavailable to the Foundation.

Additionally, and without authorization, Grievant forwarded confidential Foundation donor information to her personal email account for Grievant's personal use. That donor information was Foundation property that the Foundation considered confidential and valuable to its fundraising operations.

The Foundation's discipline was consistent with law and policy. The Foundation has met its burden.

⁴⁰ See DHRM Policy 1.60, Standards of Conduct.

⁴¹ See Agency Ex. at 1-260.

⁴² See Agency Ex. at 1-260.

Grievant's Retaliation Claim

Grievant asserted that she engaged in protected activity when she advised the Secretary of the Board Chairman's treatment of her and when her attorney advised Foundation counsel that Grievant was considering legal action including filing a complaint with the Federal Equal Employment Opportunity Commission. In order to succeed with a retaliation defense, Grievant must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.⁴³ If the Foundation presents a non-retaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the Foundation's stated reason was a mere pretext or excuse for retaliation.⁴⁴ Grievant experienced an adverse employment action when she was removed from her employment on September 11, 2023. This Hearing Officer does not need to determine whether Grievant engaged in protected activity, because even assuming Grievant did engage in protected activity, it is clear that the Foundation had non-retaliatory business reasons for the disciplinary action taken against Grievant. The Foundation has demonstrated that Grievant engaged in misconduct when she deleted more than 5,000 files from her State-issued computer and when Grievant forwarded confidential donor information from her Foundation email account to her personal email account. Because the Foundation had non-retaliatory reasons for its disciplinary action and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met her burden to prove the Foundation's disciplinary action was retaliation.

Grievant's Other Defenses

Grievant argued that the Foundation did not properly consider her response to its allegations, including her assertion that no one from the Foundation asked her about the location of documents. Grievant essentially argued that the Foundation did not afford her with sufficient due process. The hearing process cures any such deficiency. Grievant had the opportunity to present her evidence and arguments during the hearing.

Grievant argued that the Board did not follow State Freedom of Information Act requirements for open meetings or its own procedures when it placed Grievant on pre-disciplinary leave on the morning of June 20, 2023, which was prior to a Board Executive Committee meeting that occurred later that same day and a Board meeting on June 22, 2023. Thus, Grievant argued that she did not refuse to follow a lawfully given instruction when she refused to surrender her state-issued laptop computer, cellphone and other equipment until June 26, 2023, but rather that she surrendered such equipment by agreement of counsel. The record is unclear as to when the Board's Executive Committee decided to place Grievant on pre-disciplinary leave or what process the Board might have required to do so. The record is clear, however, that while the state-issued laptop computer was in Grievant's possession, Grievant deleted more than 5,000 files and

⁴³ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

⁴⁴ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

forwarded confidential donor information to her personal email account for her personal use.

Mitigation

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management....”⁴⁵ Under the Rules for Conducting Grievance Hearings, “[a] hearing officer must give deference to the agency’s consideration and 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Foundation’s issuance to Grievant of a Group III Written Notice with termination 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.

⁴⁵ Va. Code § 2.2-3005.

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.⁴⁶

Angela L. Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

⁴⁶ 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.