

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

**DECISION OF HEARING OFFICER**

In re: EDR Case Number 11999

Hearing Date: September 12, 2023 with record held open until September 15, 2023  
Decision Date: **October 5, 2023**

**DECISION OF HEARING OFFICER**

**PROCEDURAL HISTORY**

Grievant was a Housekeeping Worker Code 1-790-71 with the job title of Lead Custodian Supervisor ( Agency Exhibit (Ex. A-) 8) at a facility ("Facility"). Grievant timely filed a grievance to challenge the Agency's disciplinary action by submitting the Grievance Form A on July 14 2023 ( Ex. A-1) from a dismissal date of July 7, 2023 (Ex. A-4) as per the EDR acceptance of the Memorandum of July 24, 2023 confirming a hearing officer will be appointed for the grievance. Grievant's Form A requested "... all negative steps be removed from my records and reimburse for any monetary damage" ( Grievance form A ( Ex. A-1).

The Facility written notice, issued 07/06/23 stated Group II offenses of 11, 13, and 39 with offense dates of June 23 and June 27 25023 [sic] with the disciplinary action of Termination. That written notice also stated at Section IV- Circumstances considered "...For repeated Violations of the Same Offense, an Agency may issue a Group II Written Notice if the employee has an active Group I Written Notice for the same offense in his/her personnel file. The second Group II or a Group II in addition to three active Group I Written Notices normally results in discharge"(Ex. A-4) . The Facility had also issued prior Written Notices on May 1, 2023: Group I-Categories 1, 13, 35, and 39 (Ex. A-10), March 22, 2023 for Group III: Categories 3 and 39, mitigated to Group I and a referral to the Employee Assistance Program (Ex. A-13) ,and December 15, 2022 for Group II Categories 13, 37, 39-civility in the workplace and Ethics (Ex. A-17).

EDR appointed the undersigned as the Hearing Officer ("HO") effective August 9, 2023, 2023.

A telephone Prehearing conference was held with participation by the Grievant, the Agency representative, and the Hearing Officer, on August 11, 2023. At that conference; the Grievant requested a specific alternate hearing location, to which the parties and the HO agreed; 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.

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The Grievant, with Agency agreement, was also provided the option to receive relevant Agency document production by providing a list of such documents to the Agency by ten calendar days prior to hearing. The parties were informed that all submissions be copied to the HO. A second telephone pre-hearing conference was scheduled, by agreement, for August 24, 2023 to address any additional issues. At that time, the Agency representative was reached but Grievant, by telephone, informed that she would not participate in the conference call even if rescheduled; therefore the conference call was ended. The HO subsequently confirmed the hearing date particulars in writing to the parties ( the Agency confirmed receipt in writing) and by telephonic message to Grievant.

On September 12, 2023 , a hearing was held at the agreed upon location, commencing at the agreed upon time. The Grievant did not appear, and did not submit any documents or witness lists. The HO unsuccessfully attempted, at hearing commencement to reach the Grievant by telephone, text, and email; and the HO provided her cell/text number for Grievant to inform whether she would appear.

The parties having reached agreement on a hearing date and the production of witnesses and documents, therefore, the hearing proceeded in the absence of the Grievant. The HO left the record open, with written and telephone notice to Grievant, until September 15 , 2023 at 5:00 pm for any further communication from Grievant; there being no further communication, the hearing was closed on September 15, 2023 at 5:00 pm..

### APPEARANCES/ABSENCES

The Grievant did not appear  
Agency Representative  
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 characterize 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?

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## 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 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 Housekeeping Worker I, and a Work Title of Lead Custodian effective October 2020 (Ex. A-8); and a with a Role Title of Housekeeping Worker I and Work Title of Lead Housekeeper from 05/24/2021 (Ex. A-26).

A. Grievant signed a detailed description of work duties October 2020 (Ex. A-8).

2. Grievant's Probationary Progress review Result of 09/02/2021 Stated "Contributor- Performance shows achievement toward meeting established performance expectations...I am recommending you take supervisor training in order to better learn the HR rules here at [Facility], and to work on your communication skills with your staff..." (Ex. A-27).

3. Grievant's Probationary Progress review Result of 02/3/2022 stated " Below contributor- Performance shows deficiencies which interfere with the attainment of performance expectations" (Ex. A-8).

4. Grievant exhibited inappropriate work behavior on documented occasions, with warnings that continued violations could result in further discipline, including suspension or termination. Hearing testimony by Agency witnesses confirmed observation of the incidents and the provision of warnings testimony at the hearing( See Ex. A-26) including:

A. By Progress Review of 02/03/2022: Loss of electrostatic sprayer equipment for which Grievant was responsible on September 24, 2021; using the wrong cleaning chemicals contrary to instructions on October 13, 2021, using the supervisor's office and computer despite contrary instructions ; reluctance to use the Hydroxy Pro; recipient of several complaints of bright-work partitions and dispensers in the bathrooms; argumentative and insubordinate demeanor during meetings with supervisor regarding performance concerns (Ex. A-26).

B. A May 12, 2022 incident stated observer reports of a loud argument with a staff member, where security and coworkers intervened to diffuse, with the memorandum stating " ...Any future behavior like this may subject you to further discipline up to and including termination ..." (Ex. A-24,24).

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C. On 12-5-2022 a coworker reported to their supervisor that Grievant was demonstrating rage and aggressive behavior when asked not to tear apart the coworker's cart, as witnessed by a security Grievant failed to follow the supervisor's direction to lower her voice by "continuing to be loud and combative even after the [co worker] left the area..." person (Ex. A-18, 19, 20,21). This incident resulted in a Group II Written Notice : Categories 13, 37, 39 "...violations of DHRM policy 2.35 Civility in the Workplace and [Facility] Policy 1105-Code of Ethics (Ex. A-17).

D. Grievant filed a complaint alleging " malfeasance by a member of the security team. After Supervisor investigation, the complaint was "unfounded".(Ex. A-16).

E. On 02/01/2023 a Security Officer reported they heard Grievant speaking loudly to a co worker, and arguing with the Facility Manager, shouting and refusing directives to lower Grievant's voice and shouting and verbally accusing the Security Officer of harassment. The follow up Reporter forwarded the report to the Housekeeping Director, stating "... This is not the first negative interaction the [Facility] employee has had with this specific Top Guard Security Officer, and the negative interaction with her supervisor reads as insubordination, not to mention the yelling down the hallway at the security officer, regarding civility..."(Ex. A-15)

F. On February 24, 2023, Grievant's Supervisor sent Grievant a Memo stating requirement communications, including wearing an agency issued radio, following internal department procedures when contacted, logging onto Agency email and responding at least one time daily, and for the possibility of verbal instructions.(Ex. A- 14).

(1). As per the counseling memo of February 24, 2023, The Director of Custodial Services Memorandum of March 16, 2023, stated violation subjects of "Radio and email use requirements" and "Loud and Disruptive Behavior Violation of the Civility Policy", per the memo of February 24, 2023. The Director stated " at the [March 15, 2023] meeting your behavior of talking over me while I was attempting to speak to you about the memos was rude and discourteous. This behavior is considered a violation of the DHRM policy for Civility in the Workplace. Going forward, if you fail to utilize the [Facility] email or not respond to radio communications or to continue to be discourteous to your supervisors, you will be issued disciplinary action under DHRM's policy for Standards of Conduct, which may include suspension or discharge... [Grievant] refused to sign..." (Ex. A- 13).

G. The Agency, by actions initiated on March 31, 2023, identified that Grievant did not use her required email since September 12, with the Grievant stated reason that it was comprised. Agency investigation stated " [Grievant's] email has not been compromised in any shape, form, or fashion"(Ex. A- 12).

H. The Agency investigated an incident of April 18, 2023 between Grievant and a coworker. Grievant had objected to a coworker's poster stating National Minority Health Month information because it included LGBTQIA on it. Witness statements reported Grievant shouting and pacing, loud and argumentative, and would not stop when directed by coworkers and supervisors.(Ex. A- 10,11).

(1). The Agency, on May 21, 2023, issued a Written Notice regarding the incident of a Group 1 offense of 1, 13, and 39, stating "Violation of Policy 2.35. ...loud, ...argumentative, behavior inappropriate, and unprofessional, in violation of Civility in the workplace [and] took time from your work duties that was unnecessary; this is an abuse of state time...Failure to follow instructions, use of [Facility] email...Human Resources and [Reporter] sent [Grievant] emails asking to come to [their] office to discuss the incident of April 18<sup>th</sup>. You failed to respond or come to the requested meetings...We have discussed this previously and you continue not to follow instructions..." (Ex. A- 10).

I. By Agency May 9, 2023 Memorandum by the Director of Custodial Services, Greivant was informed that " you have not used the email system" [despite the] prior memo counseling on February 24, 2023 and an in person meeting with the department Director of March 15, 2023 to "make sure you understood that email was required of you, and in that meeting you in no uncertain terms stated that you would not use the college email system. Refusal to follow instructions is a violation of DHRM policy. Going forward , if you fail to utilize the [ Facility] email, you may be issued disciplinary action under DHRM's policy for Standards of Conduct, which may include suspension or discharge..."(Ex. A- 9).

J. An incident involving Grievant occurred June 27, 2023, during an Agency interview with the Agency Custodial Service Manager, Grievant, and 11 coworkers present. The violation addressed was Grievant's refusal the Agency directive to dispose of trash left by the day crew. The Manager wrote that Grievant refused to write a statement, verbally stated her disposal refusal, became disruptive, and was ultimately asked to leave the meeting. Co-worker statement confirmed the Grievant disruption and talking back and that Manager took her badge and keys. The Supervisor wrote he observed the trash non-removal, that Grievant was loud, disruptive, refused to follow directions, and stated she would not remove trash left by day staff, as instructed. (Ex. A-5, 6,7).

5. The Agency presented five witnesses, all of whom the HO observed to have exhibited appropriate behavior and demeanor and who testified with credible affect. All witnesses had first person interaction and knowledge of Grievant:

A. Agency Witness I ("W-I"), titled Senior Resource Manager , has 19 years Agency experience. W-I testified that s/he was personally involved with Grievant's disciplinary process, and attended meetings with Grievant to address Grievant 's workplace violations. W-I testified that s/he was personally involved with Grievant's disciplinary process,

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and attended meetings with Grievant to address Grievant's workplace violations. W-I described Grievant's inappropriate, disruptive, loud behavior in meetings. W-I testified that a Group II discipline was mitigated to Group I as per Ex. A-10,13), with a referral to the Agency confidential Employee Assistance Program ("EAP") for counseling; however Grievant refused to attend. W-I testified to using DHRM disciplinary Guidelines, including Ex. A-2,3).

(1). W-I identified Agency violations of: refusal to use required Agency email for communication, refusing to follow Supervisors instruction, loudly disruptive in Agency locations, and refusal to use designated Agency cleaning chemicals. W-I testified the discipline imposed was consistent with Agency policy and treatment of other employees.

B. Agency W-2, Titled Associate Vice President for Facilities, Management and Planning; testified to direct observations of an occasion of Grievant being disruptive, loud, yelling and argumentative with Grievant's supervisor, and refusing to follow the Supervisor's directions.

(1). W-2 testified Grievant was given opportunities to improve behavior and given probation where s/he did not show improvement, and the written Notices supported termination, as per Ex. A-14.

C. W-3, titled Housekeeping and Apparel Manager II, Director of Custodial Services; testified s/he was present at one of Grievant's disciplinary meetings where Grievant refused to sign a Memorandum, talked over W-3, which prevented others from talking, was loud and argumentative, and inappropriate to the point that W-3 stopped the meeting and asked Grievant to leave.

(1). W-3 testified the violation concerns raised included: failure to follow directions; continuing to unapproved products for job tasks rather than the Agency authorised products despite directives not to do so; continuing to not use Agency email for job communications despite directives to use email ( where the Agency had confirmed the email was not compromised); continuing to refuse to perform the assigned duty to remove trash left by the daytime staff, as per Ex. A-7; and arguing with co-workers when staff are expected to get along with co-workers, as per Ex. A-11.

D. Agency W-4 titled Custodial Manager I, Grievant's direct supervisor with 32 years Agency experience, testified regarding Grievant's continuing refusal to remove trash left by the day staff. W-4 testified that the Agency required Grievant's required daily trash removal of trash left by the day workers is necessary for sanitation reasons. W-4 testified to calling a meeting of day and night custodial staff regarding the issue and Agency requirements. At that meeting, W-4 testified that Grievant talked over other participants, Grievant stated her/his refusal to follow the trash removal directive and job requirements. W-4 also testified to other occasions where Grievant was not civil to coworkers as per Ex.-A-17, 18 and in violation to Agency civility regulations.

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(1). W-4 testified that Grievant's civility training resulted in very little positive behavioral changes.

E. Agency W-5, titled Human resources ("HR") Manager with 17 years Agency experience, testified s/he attended a disciplinary meeting with Grievant present. W-4 testified to witnessing Grievant's inappropriate behavior of agitated, loud, combative behavior and not listening to others.

(1). W-4 testified to providing training to Grievant to address civility violations which training Grievant attended but did not participate.

6. Grievant was terminated from the Facility on 07/07/2023 for offense dates of June 23 and June 27 2023 for the Offense of Group II: 13, 39, with Circumstances considered of "repeated violations of the same offense, an Agency may issue a Group II Written Notice II if the employee has an active Group I Written Notice for the same offense in his/ her personnel file...stating that the second group II or a Group II in addition to three active Group I Written Notices normally results in discharge" Ex. A-4)..

7. The Hearing Officer finds that, by a preponderance of the evidence, under the facts in this case and the applicable regulatory standards, that the Grievant engaged in the behavior described in the written notice, that the behaviors at issue constituted misconduct, and that the Agency's discipline was consistent with law. The Hearing Officer finds no mitigating circumstances justifying a reduction or removal of the disciplinary action, and notes that the Agency did previously apply mitigation, and that Grievant engaged in repeated offenses of like nature. Thus, the Agency had proper cause to terminate the Grievant under the applicable criteria.

## 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 of a more serious and/or repeat nature that require formal disciplinary action...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".

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2. DHRM Policy 2.35 Civility in the Workplace states "...the Commonwealth policy is to foster a culture that demonstrates the principles of civility, diversity, equity and inclusion...". Policy Guide 2.35 Prohibited Conduct Behaviors includes... Raising one's voice inappropriately or shouting at another person..., humiliating others..., making unwelcome or suggestive comments...

3. 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 that ensure a safe and healthy work environment...Demonstrate respect for the agency and towards the agency coworkers, supervisors, managers, subordinates...". (Ex. A-2).

4. DHRM Policy 1.45- Extended Probationary Period: Probationary periods may be extended for up to 6 additional months for performance reasons. The reasons for the extensions must be documented [ as stated therein].(Ex. A-23).

#### 5. Facility Policies

A. The Agency document "Written Notice Offense Codes" states the offence title and number. In this case, Grievant's termination offenses were stated as Group II: 13, 39 (Ex. A-4). Offense 13 is "Failure to follow instructions or policy". Offense 39 is " Violation of Policy 2.35 , Civility in the Workplace". (Ex. A-1).

B. Agency Work Description and Performance Plan "... Role Title: Housekeeping Worker /Lead Custodian...The custodian duties include but not limited to: trash removal...other cleaning duties as assigned...responsible for personnel and property protection....daily removal of trash...adheres to [Facility] cleaning schedule and standards established by the [Facility]...employee is expected to wear agency provided radio during the day, evenings, and weekends and to follow internal department procedures when contacted..."(Ex. A-8).

### DECISION

For the reasons stated above, the Agency's issuance to the Grievant of a Group II disciplinary action of Termination for repeated Group II violations of the same offense 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.

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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*

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Lois N. Manes, Esq.  
Hearing Officer

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