DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12122

Hearing Date: July 8, 2024
Decision Issued: July 14, 2024

PROCEDURAL HISTORY

On March 28, 2024, Grievant was issued 3 Group III Written Notices with termination.[1] The offense date(s) for each notice was March 7, 2024,[2] October 5, 2023-March 7, 2024,[3] and January 18, 2024-March 4, 2024.[4] On April 1, 2024, Grievant filed a grievance challenging the Agency's actions.[5] The grievance was assigned to this Hearing Officer on April 29, 2024. A hearing was held on July 8, 2024.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate Operating Procedures 135.1, 310.2, 145.3 and DHRM 2.35?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[6] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall

[1] Agency Exh. 1, at 1,4,8
[2] Agency Exh. 1 at 1
[3] Agency Exh. 1 at 4
[4] Agency Exh. 1 at 8
[5] Agency Exh. 1, at 11
[6] See Va. Code § 2.2-3004(B)

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. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.[7] However, proof must go beyond conjecture.[8] In other words, there must be more than a possibility or a mere speculation.[9]

FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact. Agency submitted a notebook containing pages 1 through 405 and one CD. Grievant objected to pages 162-165, 166-230, 243, 393-394, 395-396, and 405. Most of the objections were based on how the Table of Contents labeled these pages. After hearing argument regarding these objections, pages 243, 395-396, and 405 were excluded. The remainder of the notebook was accepted as Agency Exhibit 1. Grievant submitted a notebook containing pages 1 through 200. Without objection, it was admitted as Grievant Exhibit 1. Seventeen witnesses testified. 7 were requested by both parties, 8 on behalf of the Agency, and 2 on behalf of the Grievant. The Grievant did not testify.

The following acronyms will be used throughout this decision:
BLRJ = the Board of Regional and Local Jails
MOU = Memorandum of Understanding
ELAS =Electronic Legislative Action Summary
VADOC or **DOC**= Virginia Department of Corrections
VGA = Virginia General Assembly
EBR = Enrolled Bill Review
FOIA= Freedom of Information Act

Agency witnesses were as follows:
(1) Deputy Director of Administration for VADOC (**DDA**),
(2) Deputy Director of Public Safety and Homeland Security (**DSP**),
(3) Assistant Director of Human Resources for VADOC (**HR**),

[7] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[8] Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)
[9] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

(4) Corrections Operation Administrator/Legislative Liaison for VADOC (**COA**),
(5) Board member of the BLRJ (**BM**),
(6) An officer of a private consulting firm (**PC**),
(7) Jail Death investigator for BLRJ (**JDI**),
(8) Corrections Operations Manager/Constituent Affairs Liaison for VADOC (**CSL**).

Grievant witnesses were as follows:
(1) Superintendent of Rockbridge Regional Jail (**RRJ**),
(2) Sheriff of Chesterfield County Jail (**SCC**).

Joint witnesses were as follows:
(1) Director of Administrative Compliance for VADOC (**DAC**),
(2) Vice-Chairman of BLRJ (**VC**),
(3) Chairman of BLRJ (**CP**),
(4) Superintendent of Middle Peninsular Jail (**SMP**),
(5) Superintendent of Western Tidewater Regional Jail (**SWT**),
(6) Policy Analyst for BLRJ (**PA**),
(7) Regulatory Compliance Supervisor for BLRJ (**RCS**)

Several Operating Procedures (OP) are relevant to this matter.

OP 135.1(I)(F)(6), **Procedure**, states: "*Enable the DOC to fairly and effectively discipline, and/or terminate employees… where the misconduct and/or unacceptable performance is of such a serious nature, that a first offense warrants termination*."[10]

OP 135.1(XIV)(20), **Third Group Offenses**, states that such offenses include but are not limited to: "*Violation of DHRM Policy 2.35, Civility in the Workplace or Operating Procedure 145.3, Equal Employment Opportunity, Anti-Harassment, and Workplace Civility, considered a Group III offense, depending upon the nature of the violation*."[11]

OP 135.1, **Attachment 2,** states: "*Failure to follow supervisor's instructions or comply with written policy is a Group II offense and that Group III offenses generally include misconduct of such a nature as to severely impact the operations of the Agency. It also sets forth that in in certain extreme circumstances, an offense listed as a Group II may constitute a Group III offense. DOC may consider any unique impact that a particular offense has on the Agency."*[12]

OP 135.3 (II)(A) **General Conduct**, states: "This operating procedure applies to all employees…" [13]

OP 135.3(II)(B)(10), **General Conduct**, states: "Organizational Unit Heads will ensure that all employees…comply with Operating Procedure 145.3."[14]

[10] Agency Exh. 1 at 269
[11] Agency Exh. 1 at 282,283
[12] Agency Exhibit 1 at 291
[13] Agency Exh. 1 at 297
[14] Agency Exh. 1 at 297

OP 135.3(II)(D), **General Conduct,** states: "*Employees in DOC supervisory and managerial positions must be especially mindful of how their words and deeds might be perceived or might affect or influence others. Therefore, they may be held to a higher standard for misconduct and violations of this operating procedure based on their scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others.*"[15]

OP 145.3, **Definitions**, states: Workplace Harassment is "*Any unwelcome… written…conduct that shows hostility or aversion towards a person that has…the effect of creating an intimidating, hostile…work environment; has the effect of unreasonably interfering with an employee's work performance…"*[16]

OP 145.3(IV)(A), **Expectations and Prohibited Conduct**, states: "*It is the responsibility of all employees… to maintain a non-hostile, bias free, working environment, and to ensure that employment practices are free from workplace harassment of any kind,… bullying, retaliation, or other inappropriate behavior.*"[17]

OP 145.3(IV)(D), **Expectations and Prohibited Conduct**, states: **"***Any employee who engages in conduct determined to be harassment, discrimination, retaliation… bullying, and or other appropriate behavior… will be subject to disciplinary action under Operating Procedure 135.1 Standards of Conduct, which may include termination from employment."*[18]

OP 145.3, **Attachment 1, Guidance on Prohibited Conduct**, states: "*Prohibited conduct may include, but not be limited to demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical,… Behaving in a manner that displays a lack of regard for others and/or significantly distresses, disturbs and/or offends others… Humiliating others, making public statements with the intent of embarrassing a targeted person…"*[19]

Policy 2.35, **Civility in the Workplace** states as its **Purpose**: "*It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity, and inclusion. In keeping with this commitment, workplace harassment (including sexual harassment), bullying (including cyber bullying), and workplace violence of any kind are prohibited in state government agencies.*"[20]

Policy 2.35, **Prohibited Conduct Application** states: "*The Commonwealth strictly forbids harassment…, bullying behaviors, and threatening or violent behaviors of employees… in the workplace.*"[21]

Policy 2.35, **Engaging in Prohibited Conduct** states: "*Any employee who engages in conduct prohibited under this policy… shall be subject to corrective action, up to, and including termination, under Policy, 1.60, Standards of Conduct."*[22]

---

[15] Agency Exh. 1 at 298
[16] Agency Exh. 1 at 314
[17] Agency Exh. 1 at 317
[18] Agency Exh. 1 at 318
[19] Agency Exh. 1 at 321
[20] Agency Exh. 1, at 323
[21] Agency Exh. 1, at 325
[22] Agency Exh. 1, at 327

OP 310.2 (III)(F)(1)(b), **Email Usage**, states: "*Personal, non-work related or inappropriate comments… or other non-business-related items are not permitted in official communications using email…*"[23]

On August 23, 2021, BLRJ entered into a MOU with DOC.[24] MOU(IV)(A) states: *Furthermore, the parties agree that the Executive Director… are, for administrative purposes, employees of the DOC, within its chain of command and subject to its policies… The DOC, in close consultation with the Board, shall ensure that the Executive Director… are operating in accordance with state and federal law, and DOC policy*."[25]

MOU(IV)(I), **Dispute Resolution**, states: "*If there is a concern or dispute related to the… conduct of the Executive Director,… the parties agree that it shall first be addressed between the Chairperson and the Executive Director. If it cannot be resolved expeditiously, the Executive Director, and Chairperson may address the matter with the DOC's Director. If the matter is not resolved, expeditiously, the DOC's Director, Executive Director, and the Chairperson may address the matter with the Secretary of Public Safety or their designee.*"[26]

While Grievant did not testify, in one of his exhibits, he sets forth a position that "*VADOC does not have authority (or jurisdiction) to exercise disciplinary action unilaterally but only upon request of or at least in close consultation (i.e., advise and consent) with the BLRJ, or at least the Chairman thereof.*"[27]

On March 6, Grievant sent an email to both CP and VC. The subject line was: "*Disciplinary action and continued presence in this position*."[28]" In the body of the email, Grievant set forth his perception of the charges against him. Neither CP nor VC responded to this email. On March 12, DAC sent an email to CP containing information regarding possible disciplinary action against Grievant. On March 15, CP acknowledged Grievant's response to the amended Due Process Notification.[29] On March 19, by email, VC notified DAC that he had received and reviewed Grievant's response to the amended Due Process Notification. VC also stated: "*I, like the other Board members, helped to draft the MOU that is still current. The decision of the Board was for DOC to have the oversight of employees assigned to assist the BLRJ. I believe that is clearly communicated in the MOU. While I appreciate my inclusion in the information, this matter, rest solely with DOC leadership*."[30]

CP testified that BLRJ was subject to the rules and regulations of DOC. DDA testified Grievant was an employee of DOC and that DOC, with consultation with BLRJ, could terminate Grievant. DAC testified that he consulted with BLRJ leadership regarding terminating Grievant and was told that he was free to act.

I find that Grievant was an employee of DOC subject to its policies. I further find the Chairman and Vice-Chairman of BLRJ were notified of issues between DOC and Grievant and that neither choose to intercede for Grievant.

[23] Agency Exh. 1 at 348
[24] Agency Exh. 1 at 397-402
[25] Agency Exh. 1 at 398
[26] Agency Exh. 1 at 401,402
[27] Agency Exh. 1 at 116
[28] Agency Exh. 1 at 259
[29] Agency Exh. 1 at 403
[30] Agency Exh. 1 at 404

One of Grievant's expectations was to occasionally testify before committees of the VGA. When doing so, Grievant was to follow the following protocol which set forth when he could speak and to whom. If the Secretary: (1) Strongly oppose the bill – Speak to Patron and speak in committee
(2) Oppose - Speak to Patron. Only speak in committee if asked
(3) Amend - Speak to Patron before committee
(4) No position - Monitor
(5) Support - Speak to Patron. Only speak in committee if asked
(6) Strongly Support - Speak to Patron. Stand up and speak in committee[31]

Grievant received an email from DSP stating "*Also a reminder - I believe we covered this in a meeting earlier this week, but a strongly support/oppose means to speak on the bill. Support/oppose means you can contact the patron to let them know your position, but that you won't be speaking on the bill.*"[32]

On January 25, Grievant voluntarily, without being asked, testified before the VGA regarding HB 912.[33] The Secretary's original position was "Oppose." On February 6, this was changed to "No position." Grievant was not authorized to speak. He commented that the Patron's cost calculation for the bill was in error by 1,000%. The Patron was not pleased and informed DSP that DOC was entirely out of line. DSP apologized but testified that DOC's relationship with the delegate was damaged.

CSL was present when Grievant testified before the VGA on January 25. Grievant testified that the Secretary's Office had 'No Position.' He then proceeded to offer his personal comments regarding HB 912. CSL stated that, when this was done, it appears that there is a disconnect somewhere between the Governor - Secretary - Agency. This may damage negotiations that are taking place in the background. Ultimately, it makes everyone look bad.

On February 1, Grievant testified before the VGA regarding HB 611. This bill concerned the death of inmates while in custody. The Secretary's original position was "Oppose." On February 6, this was changed to "No position." Grievant was not authorized to speak. Whenever Grievant spoke in these circumstances, he was speaking as the Executive Director of BLRJ and, by extension, as DOC. Because death in custody is such a highly charged political issue, DSP instructed DAC that the Grievant was not to again appear at the VGA on behalf of BLRJ or DOC. Both CP and VC were copied with this instruction. Because of his testimony on these 2 bills, DSP stated that Grievant had damaged relationships between BLRJ/DOC and members of the VGA.

COA was present when Grievant offered testimony before the VGA for both HB 912 and HB 611. I was surprised that he testified, and I know of no one who gave him permission to testify. When he did this, he diminished my credibility with the legislators. The damage results because it may derail conversations and negotiations that are taking place behind the scenes.

After a bill has been passed by both the House and the Senate, it is now deemed an Enrolled Bill and is sent to the Governor for his consideration. An Agency can send its thoughts on the Enrolled Bill by way of an EBR. PA testified that she prepared an EBR for HB 912. Prior to it being uploaded to ELAS for review by the Governor, it had to be reviewed by DAC. On March 5, Grievant acknowledged that he approved PA uploading the EBR prior to review by DAC.[34] Grievant did not have the authority to authorize this action.

Regarding his testimony before the VGA and sending the EBR, in his response to his Due Process Notification, Grievant stated: "*In the future…before [I] speak, I will a) confirm with the Secretary's*

[31] Agency Exh. 1 at 245
[32] Agency Exh. 1 at 257
[33] Agency Exh. 1 at 234
[34] Agency Exh. 1 at 232

office that I am cleared to speak and b) review with them the general nature of my intended comments…I accept full responsibility. That day I was particularly busy…I do recall [PA] sending me the draft EBR. I …made a few changes…told her it was good to go…I completely forgot to forward the draft EBR to you…for review."[35]

I find that Grievant's unauthorized testimony before the VGA regarding HB 912 and HB 611, along with sending the EBR, prior to approval from DAC, to be a failure to follow supervisor's instructions or comply with written policy. The Grievant was in a supervisory and managerial position and could be held to a higher standard for misconduct and violations of Agency Operating Procedures. When he spoke as Executive Director of BLRJ, he spoke not only for them but as an employee of DOC. In this case, Grievant was barred from returning to the VGA and apologies had to be made in order to begin re-establishing credibility with the members of the VGA. The Agency was justified in treating this as a Group III offense with termination, as Grievant's action severely impacted the operations of the Agency. The Agency has met its burden of proof for the Group III Written Notice, offense dates January 18, 2024-March 4, 2024.[36]

On February 21, BLRJ held a meeting and DAC attended. At that meeting, SMP spoke about an email exchange he had with Grievant regarding standard 1045. Based on this exchange, DAC, after notifying DDA of his plans, retrieved several months of Grievant's email for review. The following is a result of that review.

On January 12, Grievant sent the members of BLRJ a draft memo setting forth BLRJ guidance on standard - 1045.[37] This dealt with death of inmates while in custody and would require multiple checks per hour to see if an inmate was breathing. That same day, SMP send an email to Grievant stating "*After reviewing the memorandum concerning 1045, there's language which will make this change almost impossible to enforce without significant confrontation with officers. This has been discussed multiple times with BLRJ staff.*"

Grievant responded with a question: *"What do you mean by 'significant confrontation' with officers?*"

SMP answered as follows: "*When an officer looks into a cell at night, the majority of inmates are covered with a blanket. It's extremely difficult to see the chest rise. In order to see that, the officer will [have] to enter most of the cells which will wake the inmate. This will occur many times if this memorandum is in effect. The inmates will quickly become angry, and many confrontations will occur.*"

Grievant followed with: '*Understood, but the alternative would be to say 'Yeah, he's here. I'll make sure he is alive in the morning'.*"[38]

SMP testified that he found this response 'pretty shitty' and wholly inappropriate and demeaning.

[35] Agency Exh. 1 at 119
[36] Agency Exh. 1 at 8
[37] Agency Exh. 1 at 36
[38] Agency Exh. 1 at 38

On February 5, SWT wrote to Grievant with questions and comments regarding standard 1045.[39] This email was in response to an email from Grievant to SWT and approximately 2 full pages of other recipients regarding BLRJ interpretation of 6VAC15-40-1045.[40] Later on February 5, Grievant responded as follows: "*Regarding what I am construing as your insinuation that I have been disingenuous in my handling of this matter, I absolutely refute the allegation and request that you give me satisfaction on that matter mano a mano, rather than before an audience of a hundred.*"[41] Of interest here is that Grievant obviously sent this response 'copy all' as it went to the same 2 full pages of recipients. SWT testified that he was not threatened, but he thought it was inappropriate, unprofessional, and a little aggressive. He testified that he was extremely upset immediately after receipt of this email. He also was concerned this was subject to a FOIA request and would reflect badly on BLRJ and DOC.

RCS testified that she found the mano a mano email to be disrespectful, unprofessional and threatening. She also was concerned about FOIA requests. BM testified that this language was inappropriate, and he too was concerned about a FOIA request. SMP found this language to not be civil and that such language adversely impacted the relationship between BLRS and its constituents. DDA testified this email was egregious, copying so many others was bad, and, based on Grievant's role as Executive Director, even worse.

On January 23, Grievant sent BM an email stating: "*To the best of my knowledge, the BLRJ never requested you to visit facilities. I understand this is something you* ***took on yourself****. BLRJ (or VADOC) neither needs nor desires for you to visit VADOC facilities. While there may be some* ***negligible value*** *to your visiting a BLRJ facility, having a Board member visit a VADOC facility adds no value to our mission. I therefore cannot support any reimbursement for expenses you incur in such* ***field trips****. Also, for all future field trips, (including to BLRJ facilities), please coordinate those directly with the facilities rather than asking [A] to coordinate for you. That is not part of her job.*"[42]

BM testified that he found the bolded language to be dismissive, inappropriate and unprofessional.

DAC testified to other emails that he found problematic. A few of which follow:

(1) November 13 to BLRJ attorney: "*I didn't know that you could request to become an inmate. I thought you had to commit a crime first.*"[43]

(2) November 20, to BLRJ attorney: "*I'm confused. Is the $44 billion he is seeking in p.2 in addition to the $1 billion from p.1? Is the total $44 billion or $45 billion? I don't think we can really get Arlington CDF shut down right away…*[44]

(3) November 30, to DSP: "*Nope.*"[45]

---

[39] Agency Exh. 1 at 173-175
[40] Agency Exhibit 1 at 175-179
[41] Agency Exh. 1 at 171-173
[42] Agency Exh. 1 at 226
[43] Agency Exh. 1 at 183
[44] Agency Exh. 1 at 185
[45] Agency Exh. 1 at 188

(4) February 7, to a news reporter: "*Is this still news? We provided this to your competition weeks ago*."[46]

(5) February 23, to Sheriffs and Superintendents: "*We hope that you will recognize that in this instance the Board is going through this process not because it has to but rather in our spirit of unrequired openness*."[47]

VC testified that he saw some of the Grievant's emails. A tipping point for him was an email sent by Grievant to the BLRJ Board on February 12. It said: "*Once again, I must remind Board members not to reply-all on emails re BLRJ business. Seriously, it is not that difficult. Just don't do it*."[48]

HR testified that he reviewed many emails sent by Grievant and found many violated OP 310.2 and OP 2.35. HR further testified that, on March 6, DAC instructed Grievant to not send anymore inappropriate emails. On March 27, Grievant sent approximately 25 emails[49] that he felt were in the form of apologies.[50] All contained the final line: "*If no offense was taken, then no response is requested or desired."* One stated: "*I now recognize that the DOC does not allow humor in email on its server*."[51] Another stated: "I *now understand that the DOC does not tolerate humor in email, and henceforth I will refrain from any such attempts at levity*."[52]

These apology emails in total were insincere in their tone and message, re-opened issues that may have been settled, and are an obvious issue should they be subject to a FIOA request. And, they came within 24 hours of the Grievant being directed to not send such emails.

DAC testified that he served in the same capacity as Grievant prior to Grievant being employed by BLRJ. As Executive Director of BLRJ, Grievant was the person who managed relationships with all constituents of BLRJ, including the Governor's office, Jails, Sheriffs, Superintendents, and the VGA. He must lead with a soft touch. DAC stated that it was not the role of CP or VC to shepherd Grievant's emails.

Grievant's most recent Employee Performance Plan and Evaluation (EPP) was dated October 17, 2023. DAC, serving as Grievant's supervisor, was the author and he stated: *"[Grievant's] position is very public facing. His emails are often the subject of media requests. [Grievant] should continue considering the tone and potential implications of his emails before he decides to send them. This is a topic I expect him to pay particular attention to improving upon in the upcoming year."*[53]

Grievant, in his questioning of many witnesses, tried to imply he was not trained on email etiquette, the Agency should have trained him, he was unaware there was a problem, thought he was simply being humorous, and generally did not understand the many problems with his

[46] Agency Exh. 1 at 197
[47] Agency Exh. 1 at 90
[48] Agency Exh. 1 at 199
[49] Agency Exh. 1 at 142-161
[50] Agency Exh. 1 at 119
[51] Agency Exh. 1 at 151
[52] Agency Exh. 1 at 160
[53] Agency Exh. 1 at 130,131

emails. None of these contentions is credible. Grievant is a trained attorney. His most recent EPP put him on notice of his email issues.

Accordingly, I find that Grievant's emails were unwelcome, unprofessional, rude, showed hostility or aversion towards a person and had the effect of creating an intimidating, hostile work environment that unreasonably interfered with an employee's work performance. The emails were inappropriate and should not have part of official communications. Grievant was the Executive Director of BLRJ and should have been especially mindful of how his words might be perceived or might affect or influence others. He is held to a higher standard for misconduct and violations based on his scope of authority and influence, status as a role model, and ability to significantly impact the employment status and direct the work of others. He also has created a minefield of potential harm to the Agency should these emails be produced through a FOIA request.

I find the Grievant's emails and his sending "Apology" emails after being instructed to not do so, justify the Group III Written Notice, offense date March 7, 2024,[54] and the Group III Written Notice, offense dates October 5, 2023-March 7, 2024.[55]

Finally, while my decision in this matter is governed by the above recitation, Grievant, in his March 11 response to the Due Process Notification, stated: "*I must enter a plea of nolo contendere to the charges, offenses, and counts alleged against me*."[56] Grievant is a trained lawyer and is aware that this means "*I do not wish to contend*."[57]. In as much as Grievant vigorously contested being terminated, I can only assume he used this term in error.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in 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.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency

[54] Agency Exh. 1 at 1
[55] Agency Exh. 1 at 4
[56] Agency Exh. 1 at 122
[57] Black's Law Dictionary, 10th Addition

has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of 3 Group III Written Notices with termination was proper.

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 that 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 where the grievance arose within **30 days** of the date when the decision becomes final.[1]

[1] 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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: July 14, 2024