

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 12155

Hearing Officer Appointment: July 29, 2024  
Hearing Dates: September 16, 2024  
Decision Issued: September 17, 2024

PROCEDURAL HISTORY AND ISSUES

The Grievant was until recently a Housekeeper at a hospital facility (the “Facility”) of the Department of Behavioral Health and Developmental Services (“DBHDS” or the “Department” or the “Agency”). The Grievant requested an administrative due process hearing to challenge the issuance on July 2, 2024, of a Group III Written Notice, by management of the DBHDS, as described in the Grievance Form A. The issues for hearing are those delineated by the Grievant in his Form A.

On August 15, 2024, at 11 am, the parties held a first prehearing conference call via Zoom. The Grievant, the Agency’s advocate and the hearing officer participated in the call.

The parties all agreed that email is acceptable as a sole means of written communication.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant represented himself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-89 in the Agency's black exhibit binder and exhibits 1-2 from the Grievant.<sup>1</sup>

### APPEARANCES

Representative for Agency  
Grievant  
Legal Counsel/Advocate  
Witnesses

### FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Housekeeping Worker at DBHDS. AE 28 & GE 1.
2. According to his Employee Work Profile ("EWP"), the Grievant was ,amongst other things, to "provide a safe, sanitary and attractive environment for patients, staff and visitors at [Facility]..." AE 28.
3. Teamwork is stressed in the EWP. *See, e.g.*, AE 31.

### GROUP III WRITTEN NOTICE:

4. On Saturday, June 22, 2024, Grievant was texting a female coworker (V) all day, asking where she was and what she was doing.

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<sup>1</sup> References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are designated GE followed by the exhibit number.

5. The Grievant cornered V in the Two Pines preparation room and said: "I'm going to take you back to my apartment and make love to you and have a baby with you."
6. Previously, Grievant had engaged in repeated unsolicited and unwanted suggestive comments, touching and rubbing concerning V, sometimes adding that V should not inform HR.
7. Grievant's behavior was disruptive, impeding workplace cooperation, trust or teamwork and threatening the integrity of the hospital environment.
8. V did not feel safe working with the Grievant based on his behavior and comments. V was subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or other conduct of a sexual nature that created an intimidating or offensive work environment for V.
9. The Grievant's disciplinary infractions concerning this case did negatively impact the Agency's operations. During the hearing, the Grievant repeatedly apologized for his behavior.
10. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
11. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
12. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

13. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

### APPLICABLE LAW, ANALYSIS AND DECISION

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).

*Va. Code* § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the “SOC”). AE 9. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

GROUP III WRITTEN NOTICE:

The Grievant’s disciplinary infractions were reasonably classified by management as a Group III offense. The hearing officer agrees with the Agency's advocate that the offenses are appropriately classified at the Group III level with the Agency appropriately exercising the discipline. Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

This case involves, amongst other things, the recently established DHRM Policy 2.35, *Civility in the Workplace*, which supersedes the former Policy 1.80, Workplace Violence, and former Policy 2.30, Workplace Harassment.

As stressed in the purpose of Policy 2.35, "It is the policy of the Commonwealth to foster a culture that demonstrates the principles of civility, diversity, equity and inclusion.” AE 43.

Policy 2.35 further provides:

“Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.” AE 45.

Both *Discriminatory Workplace Harassment* and *Non-discriminatory Workplace Harassment* are prohibited by Policy 2.35. Policy 2.35 defines the term *Non- Discriminatory Workplace Harassment* [Harassment not based on protected classes] as:

“Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion to a person not predicated on the person's protected class.” AE 48.

A single violation of DHRM 2.35 can be a Group III offense.

According to EDR, “Policy 2.35 and its associated guidance permit agencies to assess the severity of an offense and its effect on the workplace in selecting the appropriate level of discipline. These determinations are fact-specific and subject to substantial discretion by agency management; thus, disciplinary actions are not necessarily comparable across agencies.” DHRM 2021-5194.

The Grievant’s behavior undermined team, Agency and mission morale and cohesion, disrupting confidence in the Agency and its abilities and thereby also materially adversely impacted its operations. In short, the Grievant violated Policy 2.35 in a material and severe sense, as determined by the Agency.

In DHRM 2020-5003, EDR held that a single Group III Written Notice is an appropriate action when the totality of the conduct demonstrates a serious policy violation.

The Hearing Officer in that case initially concluded that the Agency needed to issue a single group notice for each offense. The agency had issued a single Group III Written Notice instead of multiple Group II notices. The hearing officer reduced the discipline to a Group II Written Notice.

Reversing the hearing officer's decision, EDR wrote, "The outcome of the hearing decision, in this case, is largely driven by an underlying interpretation of policy by the hearing officer: whether the grievant's conduct should be reviewed as individual acts or collectively. The agency took the approach that it would consider the grievant's conduct collectively, resulting in a single disciplinary action. The hearing officer has determined that the Standards of Conduct policy does not authorize this approach. However, the hearing officer is incorrect in his interpretation. While the grievant's behavior could be viewed as individual acts and, therefore, assessed and disciplined separately, nothing in the policy prohibits the agency's approach here. The resulting charges in the disciplinary action at issue, in this case, are all reasonably viewed as a course of behavior by the grievant in his use of state e-mail and an agency-assigned computer, and not a collection of unrelated, distinct issues of misconduct. Accordingly, the hearing decision is inconsistent with policy."

While the Grievant argues that the Agency's discipline was unwarranted under the circumstances, the hearing officer finds, to the contrary, that Management's expectations were clearly communicated to the Grievant on multiple occasions. Grievant was required to retake training on precisely the infractions at issue here. AE 80-81.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that the violations rose to the level of a Group III offense.

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; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

The Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past service to the Agency.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the Grievant's years of service to the Agency;
2. the demands of the Grievant's work environment;
3. the Grievant's job performance;
4. the Grievant's asserted absence of intent to offend.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's



length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the policy is important to the proper functioning, appearance and reputation of the Agency, the Grievant holds an important position as Program Manager and the Agency issued to the Grievant significant prior notice in the past. The Grievant has an inactive Group I and received a Written Counseling in 2021 for violating Policy 2.35. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given 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. Accordingly, 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 is not a "super-personnel officer" and 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.  
*Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the Written Notice and the offenses specified in the Written Notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary actions.

### DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notices and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

### **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 and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail 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-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.<sup>2</sup>

ENTER 9/ 17/ 2024

*John Robinson*

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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by e-mail transmission as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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<sup>2</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.