

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

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 12177

Hearing Date: December 16, 2024
Decision Issued: December 19, 2024

PROCEDURAL HISTORY

On June 21, 2024, the Agency issued Grievant a Group III Written Notice of disciplinary action, with demotion and pay reduction. The offense was breach of safety policy and instruction occurring June 7, 2024.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action, seeking removal of the Group III offense and reinstatement.¹ The matter advanced to hearing. On October 7, 2024, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for December 16, 2024, the first available date available for the parties. On December 16, 2024, the hearing was held in-person at the Agency's facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency Exhibits. The Grievant relied on the Agency's documents. The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
Witnesses

¹ The Grievant asserted that the Agency failed to respond timely to his grievance steps. However, EDR has repeatedly held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies. See, for example, EDR Ruling No. 2013-3601 (2013).

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual (GPM) § 5.8.* However, § 5.8 states “[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.” A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Under Operating Procedure 135.1, *Standards of Conduct*, Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that include, but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws. Group III offenses specifically include:

- Violating safety rules where there is a threat of physical violence.
- Negligence on the job that results (or could have resulted) in the death, or serious injury of persons, including, but not limited to, employees, supervisors, volunteers, inmates/probationers/parolees, visitors, an/or students, or the escaping/absconding of inmates/probationers/parolees.
- Refusal to obey instructions that could result in a weakening of security.

Agency Exh. 9.

Security Post Order #134 provides:

- The Housing Unit Control Booth Door is not to be opened when inmates are in the area. Prior to opening the Control Booth door, verify that both Pod doors and the second Control Booth sally port doors are secured. Conduct a visual inspection of the sally port to ensure no inmates are present.

Agency Exh. 10.

The Offense

The Group III Written Notice, issued by the Senior Warden on June 21, 2024, detailed the facts of the offense, and concluded:

[Grievant] compromised the security. He jeopardized the safety of the inmates and staff who were present when he failed to ensure the sally port was clear of all inmates before opening the control room door. He also jeopardized the trust the public has in the VADOC. That inmate could have over-powered [Grievant] and took control over the entire Housing Unit and possibly the entire facility.

Agency Exh. 1. For circumstances considered, the Written Notice stated, “Max Pro Video as evidence.”

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

The Agency employed the Grievant as a lieutenant, without other active disciplinary actions.

The Agency witnesses testified consistently and credibly about the charged conduct in the Written Notice. Testimony provided by the Senior Warden and Lead Warden, in addition to the video evidence provided by the Agency, confirmed the facts alleged in the Written Notice. The Max Pro video evidence shows that the Grievant acknowledged the presence of the inmate in the sally port when he signaled the control room officer to open the door. Agency Exh. 11. The Agency witnesses confirmed the training provided to the Grievant and post order for clearing the sally port before opening the control room door.

The Agency witnesses testified that the officer who physically opened the control room door at the Grievant’s signal was also disciplined with a Group III Written Notice. The Agency witnesses also testified that mitigation was considered, recognizing the Grievant’s good work record weighing against job termination that is warranted by a Group III Written Notice. The Agency witnesses testified that they were not on notice of any causal condition or accommodation requested by the Grievant.²

² The record includes a medical report, dated June 24, 2024, stating, “The incident that occurred on 6/7/2024 likely occurred due to hyperglycemia causing blurred vision. Please excuse patient from work following this incident.” Agency Exh. 3. This was mentioned in the Grievant’s written grievance (Agency Exh. 6.), but the Grievant did not testify concerning this condition and any impact such circumstances caused.

The Americans with Disabilities Act (“ADA”) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual’s disability. 42 U.S.C. § 12112. Under the ADA, the term “disability” means, “with respect to an individual— (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2). To be

The Grievant, through his testimony, confirmed his offending conduct but he asserted that the discipline was too severe for this offense. Based on the weight of the evidence, the Grievant engaged in behavior that constitutes the policy violation that risked the safety of the inmates, staff, and facility.

Analysis

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior.

"substantially limited" in a major life activity, the grievant must be significantly restricted in performing the activity. *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 196-97 (2002). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2 (i). Refusing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" is a prohibited form of discrimination under the ADA. 42 U.S.C. § 12112(b)(5)(A). However, the employer will not be required to offer the accommodation if it would "impose an undue hardship on the operation of the business" of the employer. *Id.* Assuming the Grievant's hyperglycemia renders him a qualified individual, there is insufficient evidence that the inadequate performance at issue was the result of the Grievant's hyperglycemia. Further, the evidence is uncontradicted that the Grievant had not placed the Agency on any notice of a request for accommodation.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, including the Grievant's admissions, and the Max Pro video that confirms the facts of the offense, I find that the Agency has proved the misconduct charged in the Written Notice.

I find that the instance of conduct charged in the Written Notice constitutes a significant security breach and, therefore, a Group III offense. Accordingly, I find that the Group III discipline, with demotion and 10% pay reduction, is consistent with policy.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." The Agency's Policy 135.1, *Standards of Conduct*, is consistent with DHRM policy. 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.

EDR has further explained:

When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency's mitigation decision is fairly debatable. Because I am not a "super-personnel officer," even if I would have elected lesser discipline, I lack the authority to reduce the discipline under these circumstances. The mitigating factors offered by the Grievant do not rise to the level required to alter the Agency's election to exercise its discretionary discipline.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice, with demotion and 10% pay reduction, must be and is upheld.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

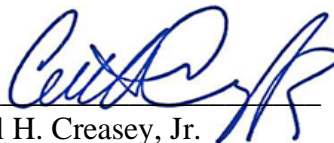
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.³

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.


Cecil H. Creasey, Jr.
Hearing Officer

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.