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. 12199

Hearing Date: December 20, 2024
Decision Issued: December 27, 2024

PROCEDURAL HISTORY

On March 25, 2024, the Agency issued Grievant a Group I Written Notice of disciplinary action. The offense was failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedures, between September 7, 2023, and January 11, 2024.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action, seeking removal of the Group I offense. The matter advanced to hearing. On November 12, 2024, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for December 20, 2024, the first available date available for the parties. On December 20, 2024, the hearing was held in-person at the Agency's facility.

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

APPEARANCES

Grievant
Agency Representative
Advocate for Agency
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 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 I offenses include acts and behavior less severe in nature, have relatively minor impact on business operations, but require correction in the interest of maintaining a productive and well-managed work force. Inadequate or unsatisfactory job performance is a definitive example of a Group I offense. Agency Exh. p. 43.

The Offense

The Group I Written Notice, issued by the former Chief Probation Officer on March 25, 2024, detailed the facts of the offense, and concluded:

> A violation of Departmental Operating Procedure 930.1, *Community Corrections Investigations*, II. (H.), The completed Presentence Report must be LOCKED in VACORIS using the submit button before being submitted to the sentencing Judge, Commonwealth's Attorney, and Defense Attorney at least five days prior to the sentencing hearing unless waived by the Judge.
>
> Specifically on March 11, 2019, Deputy Chief Probation Officer [ ] sent an email to the staff at the [ ] that established guidelines for the submission of presentence reports to the supervisor. The email stated: "Effective 4/1/19, Presentence Reports should be submitted to a supervisor for review 14 days prior to sentencing. This will allow time for corrections and processing to ensure the Attorneys receive it 5 days prior to sentencing per the Code of Virginia. It will also take into consideration that supervisors or staff may be unavailable due to training, leave, etc." Probation Officer (PO) [Grievant] was included on this. email thread.
>
> On November 16, 2023, a Working Dialogue was held at the [ ]. The topic of discussion was *Best Practices for Pre-Sentence Writing.* During the dialogue, the following requirements were identified:

• “Timely completion of Presentence Reports (PSR) and meet the five (5) day code deadline.”
• “All supervisors can approve PSRs”.
• “PSR submitted to supervisor 14 days before the sentencing date.'”
• “[Grievant] is the current PSR writer, and all other officers will receive one (1) PSR per quarter.”

On September 7, 2023, the Southampton Circuit Court ordered a presentence report on [ ] and was set for sentencing on January 16, 2024. The completion of this report was assigned to PO [Grievant] on September 7, 2023, in Virginia Coris. The report was due to the supervisor for review no later than January 2, 2024. It was due for submission to the Court no later than January 11, 2024. On December 13, 2023, a subpoena was received for [Grievant], Probation Officer to testify in the Circuit Court of Southampton for the case of the Commonwealth of Virginia v. [ ] PO [Grievant] called out of work sick and remained out of work from December 26, 2023, through January 7, 2024. The presentence report was not completed prior to his absence from work. [ ] has been incarcerated since October 7, 2022.

On January 8, 2024, upon returning to work PO [Grievant] met with his supervisor, [ ], Probation Officer Sr. (SPO), to discuss the delinquent presentence report. He was instructed to contact the court to request a continuance which was granted on January 15, 2024. The court continued the case until March 28, 2024. A presentence report package with a cover letter dated March 1, 2024, was submitted by PO [Grievant] to his supervisor for review. On March 7, 2024, SPO [ ] initialed and approved the report which was forwarded to all applicable parties in accordance with the Code of Virginia. A review of the packet revealed that PO [Grievant] did not conduct the presentence interview with [ ] until February 12, 2024, at Southampton Jail. There was no documentation in the file that indicated any preliminary work had been conducted in preparation for the presentence report prior to PO [Grievant]’s last day in the office on December 22, 2023.

On September 7, 2023, the Southampton Circuit Court ordered a presentence report on [ ] and was set for sentencing on January 16, 2024. The completion of this report was also assigned to PO [Grievant] on September 7, 2023, in Virginia Coris. The report was due to the supervisor for review no later than January 2, 2024. It was due for submission to the Court no later than January 11, 2024. On December 13, 2023, a subpoena was received for [Grievant], Probation Officer to testify as a witness in the Circuit Court of Southampton for the case of the Commonwealth of Virginia v. [ ]. This presentence report was also not completed prior to his absence from work. [ ] has been incarcerated since March 30, 2023.

PO [Grievant] contacted the court for a continuance. On January 11, 2023, PO [Grievant] sent an email to attorneys [Commonwealth Attorney] and [ ]. The subject of the email was *Presentence on* [ ]. The email stated, “[ ] is currently scheduled for sentencing in the Southampton County Circuit on January 16, 2024.” “This officer has been out on very unexpected sick leave most of the last three weeks. This most inconvenient event has set my completion of

these three scheduled presentence reports for that date, upside down." "I greatly regret my need to ask for a brief continuance to complete [ ] Report, so I can have it completed and submitted properly." This email was not factual, as PO [Grievant] was not out of work for three weeks and had sufficient time to complete the report. The court continued the case until March 28, 2024.

A presentence report package with a cover letter dated March 7, 2024, was submitted by PO [Grievant] to his supervisor for review. On March 8, 2024, SPO [ ] initialed and approved the report which was forwarded to all applicable parties in accordance with the Code of Virginia. A review of the packet revealed that PO [Grievant] did not conduct the presentence interview with [ ] until February 12, 2024, at the Southampton County Jail. There was no documentation in the file that indicated any preliminary work had been conducted in preparation for the presentence report prior to PO [Grievant]'s last day in the office on December 22, 2023.

Additionally, on November 16, 2023, the Southampton Circuit Court ordered a presentence report on [ ] that was due in court on January 16, 2023. The task of completing this report was assigned to PO [Grievant] on November 16, 2023, in Virginia Coris. The report was due to the supervisor for review no later than January 2, 2024. It was due for submission to the Court no later than January 11, 2024. On December 13, 2023, a subpoena was received for [Grievant], Probation Officer to testify as a witness in the Circuit Court of Southampton for the case of the Commonwealth of Virginia v. [ ]. PO [Grievant] did not complete this presentence report either prior to his absence from work. PO [Grievant] contacted the court, and the case was continued until Fcbruary 20, 2024. [ ] has been incarcerated since January 22, 2023.

A presentence report package with a cover letter dated January 31, 2024, was submitted by PO [Grievant] to his supervisor for review. On January 31, 2024, SPO [ ] initialed and approved the report which was forwarded to all applicable parties in accordance with the Code of Virginia. A review of the packet revealed that PO [Grievant] did not conduct presentence interview with [ ] until January 23, 2024, at the Western Tidewater Regional Jail. There was no documentation in the file that indicated any preliminary work had been conducted in preparation for the presentence rcport prior to PO [Grievant]'s last day in the office on December 22, 2023.

Moreover, PO [Grievant] had almost 4 months to complete the presentence reports for [ ] and [ ]. He had a month and a half to complete the report for [ ]. There were only four (4) working days between December 26, 2023, and January 2, 2024, when all three reports were due to his supervisor, however, PO [Grievant] had not conducted presentence interviews with anyone. PO [Grievant] did not notify his supervisor of the status of the three (3) presentence reports or of any potential delays prior to his absence from work. There was insufficient time from when SPO [ ] became aware that PO [Grievant]'s absence from work would extend beyond a few days to assign the presentence reports to other staff for completion due to the amount of time needed to gather the preliminary information and draft the report. PO [Grievant]'s lack of timeliness with assigned presentence reports had previously been addressed.

As a result of unsatisfactory work performance, PO [Grievant] was placed on a Notice of Improvement Needed/Substandard Performance plan from May 25, 2023, to August 25, 2023. He signed that document on June 26, 2023. The performance plan addressed several issues to include the timeliness with presentence reports and outline the expectation that that PO [Grievant] will complete Presentence Reports and tum them in to the supervisor 14 days prior to court date for review. This expectation was also noted and discussed in PO [Grievant]'s Performance Evaluation that was reviewed and signed on October 30, 2023.

PO [Grievant] failed to follow VADOC operating procedure and established district protocol to complete the assigned presentence investigations in a timely manner in violation of Departmental Operating Procedure 930.1, Community Corrections Investigations. An extension had to be requested for all three (3) Presentence Reports as they were not submitted to the sentencing Judge, Commonwealth's Attorney, and Defense Attorney at least five days prior to the sentencing hearing.

In accordance with DOP 135.1, Standards of Conduct, G., Personal Conduct - DOC staff members are employed to fulfill certain duties and fulfill expectations that support the mission and values of the DOC and are expected to conduct themselves in a manner deserving of public trust. The following list is not all-inclusive but is intended to illustrate the minimum expectations for acceptable workplace conduct and performance. Employees who contribute to the success of the DOC mission:

2. Devote full effort to job responsibilities during work hours; meet or exceed established job performance expectations.

5. Inadequate or unsatisfactory job performance.

PO [Grievant]'s actions created a lack of public trust in the Department from the Court, Commonwealth's Attorney, and Defense Attorneys. He falsified information provided to the Commonwealth and defense attorneys regarding his period [of] absence. The continuation of these cases could have resulted in a violation of the probationers' due process. It also created an additional burden on our judicial partners as the cases had to be continued resulting in an impact on court resources, taxpayers' funds, legal fees, and judicial schedules.

Your actions are a violation of DOP 135.l, *Standards of Conduct* for failing to follow supervisor's instruction, perform assigned work and otherwise comply with applicable established policy and procedure and a violation of DOP 930.1, *Community Corrections Investigations,* for failing to comply with established guidelines governing the submission of a Presentence Report. Consequently, your actions are subject to disciplinary action under OP 135.l, *Standards of Conduct.* Therefore, a Group II Written Notice is warranted. However, after consideration of mitigating factors this has been reduced to a Group I Written Notice for unsatisfactory work performance.

Agency Exh. pp. 1-4. For circumstances considered, the Written Notice stated, "You have 33 years and 9 months of VADOC experience with a most recent performance rating of Contributor. You have no active Written Notices on file."

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 probation officer, 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 Probation Officer and Chief Probation Officer confirmed the facts alleged in the Written Notice regarding untimeliness of at least initiating the preparation of the presentence reports. The reports vary regarding the time required, and one cannot discern the amount of time required until the report is started. The defendant must be interviewed for each presentence report. The Agency witnesses confirmed the training and counseling provided to the Grievant regarding internal and external deadlines for completing the presentence reports. While the Grievant was only out sick for four business days because of illness, the Grievant had not started any work on the presentence reports before his unplanned absence.

The Agency witnesses also testified that mitigation was considered, recognizing the Grievant's good work record weighing in favor of mitigating a Group II offense down to a Group I Written Notice.

The Grievant, through his testimony, confirmed his conduct of not attending to the presentence reports before December 26, 2023, when he began his sick leave. But he asserted that the discipline was too severe for this offense. The Grievant testified that he could have completed the presentence reports before the court deadline, but he could not have met the internal supervisory deadline. The Grievant confirmed that one cannot predict how long a presentence report might take to complete. Based on the weight of the evidence, the Grievant failed to even start work on the presentence reports before his unplanned sick leave. This lack of attention is within the scope of the prior Notice of Improvement Needed for attention to timeliness and rendered the unplanned sick leave more critically detrimental to Agency function. The Grievant engaged in behavior that constitutes the policy violation that was ultimately disciplined as unsatisfactory job performance. However, the Grievant expressed his belief that the former chief who issued the Written Notice was looking for some reason to issue discipline against him. The Grievant testified that he was instructed by his supervisor to request the continuance from the Circuit Court, so that could not serve as basis for discipline. The Grievant also produced character reference documentation that confirmed his good reputation. Grievant's Exh. pp. 1-3.

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.

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. The Agency is justified in expecting work on these presentence reports to have begun before December 26, 2023. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, including the Grievant's admissions that confirm the untimely attention to the presentence reports, I find that the Agency has proved the untimeliness misconduct charged in the Written Notice.

In general, agencies are entitled to expect good judgment from its employees. Failure to meet these expectations may constitute unsatisfactory performance, even in the absence of specific policy instruction. *See*, for example, EDR Ruling No. 2024-5710. With one exception, I find that the instances of conduct charged in the Written Notice constitute unsatisfactory work performance and, therefore, satisfies a Group I offense. The exception is the charge that the Grievant falsified information provided to the Commonwealth and defense attorneys regarding his period of absence. Falsification is not defined by the Standards of Conduct, but the Hearing Officer interprets this provision to require proof of an intent by the employee to make something false in order for the falsification to rise to the level justifying discipline. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Black's Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

> to alter with intent to defraud, to falsify accounts|| to misrepresent, to falsify an issue || to pervert, to falsify the course of justice.

Falsification is a serious charge, and it is identified in the Standards of Conduct as a probable Group III offense. Falsification is analogous to fraud in significance. One who asserts actual fraud bears the burden of proving: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994). And "[c]oncealment of a material fact by one who knows that the other party is acting upon the assumption that the fact does not exist constitutes actionable fraud." *Spence v. Griffin*, 236 Va. 21, 28, 372 S.E.2d 595, 598-99 (1988); *see also Van Deusen v. Snead*, 247 Va. 324, 328, 441 S.E.2d 207, 209 (1994). I find, based on the testimony, manner, tone, and demeanor of the testifying witnesses, including the Grievant, that the Agency failed to prove the Grievant's intent to falsify.

Contrary to the Grievant's approach to the grievance, the discipline was not for requesting the continuances from the Circuit Court. The misconduct was untimely inattention to the presentence reports, leaving too little time to complete thoroughly even

without the unplanned sick leave. The sick leave did not cause the issues—it brought the issues to the attention of the Agency, causing the Agency to elect to request continuances. This judgment of work performance falls within the Agency's discretion, especially given the prior counseling on timeliness. The Agency could have elected lesser discipline along the continuum of progressive discipline, but it is not required to exercise informal discipline in lieu of formal. The Agency elected formal discipline because of the prior Notice of Improvement Needed addressing the Grievant's time management for the applicable presentence report deadlines. Accordingly, I find that the Group I discipline, 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 though I may have elected lesser discipline, I lack the authority

to reduce the discipline under these circumstances. While the Grievant believed some ulterior motive, there is insufficient evidence of such improper motive. 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 I Written Notice must be and is upheld, but with the element of falsification reversed and removed.

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.

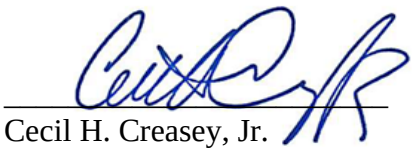
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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.[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].

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