

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYEE DISPUTE RESOLUTION
DIVISION OF HEARINGS

In the matter of Case No.: 12274
Hearing Date: 22 May 2025
Decision Issued: May 2025

PROCEDURAL HISTORY

On 6 March 2025, Grievant was issued a Group II Written Notice of disciplinary action with termination. In the written notice, the Agency described the nature of the offense as including Violation Codes 11 [Unsatisfactory performance], 13 [Failure to follow instructions or policy], 36, [Obscene or abusive language], 37 [Disruptive behavior], and 39 [Violation of Policy 2.25, Civility in the Workplace]. The Written Notice further specified that Grievant had violated DHRM policy 1.60 Standards of Conduct which outlines the minimum expectations for acceptable workplace conduct and performance.

On 2 April 2025, Grievant properly and timely filed a Grievance Form A to challenge the Agency's action. On 21 April 2025, the Office of Employment Dispute Resolution assigned this matter to this Hearing Officer.

The Hearing Officer attempted on multiple occasions to contact the Grievant and the Agency representative to arrange a Pre-Hearing Conference. The representative for the Agency responded to the Hearing Officer's efforts but Petitioner did not. Accordingly, pursuant to Section III. B. of the Rules for Conducting Grievance Hearings, the Hearing Officer set a date for the Hearing without a Pre-Hearing Conference and on 4 May 2025, he issued his Pre-Hearing Order that included Notice of the Hearing Date and sent same to the parties via Certified Mail.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits. Grievant did not submit any documents to be considered as evidence.

On 22 May 2025 the hearing was held in-person at the Agency's facility. 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

ISSUES

1. Whether Grievant engaged in the behavior described in the Group II Written Notice of disciplinary action?
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 II 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

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 Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

The Grievant requested an administrative due process hearing to challenge termination of his employment at a facility (the "Facility") of the Department of Motor Vehicles (the "Agency"), effective 5 March 2025, pursuant to a Group II Written Notice issued by Management of the Agency, as described in the Grievance Form A submitted by Grievant dated 5 March 2025.

FINDINGS OF FACT

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

Prior to his dismissal, Grievant was a Customer Service Generalist at a Facility of the Agency. Grievant had worked at the Agency since November 2021. (See Exhibit 11; Employee Work Profile.) Prior to his termination, Grievant had previously been awarded the following Written Notices:

- On 8 October 2024: Group I Written Notice for violations of Written Notice Work Codes 11 [Unsatisfactory performance], 13 [Failure to follow instructions or policy], 37 [Disruptive behavior], and 39 [Violation of Policy 2.25, Civility in the Workplace] on 8 October 2024.

- On 15 November 2024: Group II Written Notice for violations of Written Notice Work Codes 11 [Unsatisfactory performance], 13 [Failure to follow instructions or policy], 37 [Disruptive behavior], and 39 [Violation of Policy 2.25, Civility in the Workplace]

Grievant did not submit a grievance for either of the two prior Written Notices. These Notices were still in effect when Grievant was terminated.

The Offense

The Written Notice dated 10 February 2025 as well as the Due Process Notice of Intent dated 28 February 2025 along with the other documentary evidence indicated that the termination was the culmination of Grievant's prior work performance as well as events that occurred on the 7 February 2025 when Grievant's Direct Supervisor attempted to counsel Grievant regarding three recent complaints from customers. The documentary evidence confirmed that prior to the Written Notice issued on 10 February 2025, Grievant had been counseled about his performance and informed that if he continued to receive complaints from customers he could be terminated. See, Exhibit 5 (Written Notice dated 8 October 2024); Exhibit 6 (Written Notice dated 15 November 2024); Exhibit 12 (Performance Review dated 5 December 2025).

The Agency witnesses testified consistently and credibly about Grievant's conduct as described in the documentation submitted by the Agency as evidence.

Testimony provided by Grievant's Direct Supervisor confirmed the facts provided in the Written Notice as well as the events that transpired three days earlier (on 7 February 2025) when the Direct Supervisor attempted to counsel Grievant regarding customer complaints that he just received. The Direct Supervisor stated that when Grievant asked if he was being fired, he declined to provide an answer, but noted that he stated to Grievant that it would be better to resign than be fired. The Direct Supervisor stated that the Grievant then became very loud and argumentative and stated, among other things that the customer complaints should not be believed and that the Direct Supervisor failed to protect him from the customers. The Direct Supervisor stated that other employees informed him that Grievant was cursing as he left the building.

Two witnesses confirmed that they heard the Grievant cursing as he left the building on 7 February. The witnesses further stated that they considered Grievant's words and actions to be threatening in nature.

On 10 February 2025, Grievant was called into a meeting with the District Manager regarding various complaints from customers regarding Grievant's performance. In the course of the conversation, the District Manager either stated or strongly implied to Grievant that he would be terminated. Thereafter, Grievant requested and was permitted to terminate the meeting.

After Grievant left the meeting with the District Manager as well as other employees of the agency heard Grievant say “F*** this,” or words to that effect. Grievant was also heard by other employees to say, “They will regret firing me.” Grievant also sent to the District Manager a text message that stated, “Just so you know, I’m going to get your staff fired. All it takes is complaints, whether they’re true or not. Get ready to lose everybody you have there!” See Agency Exhibit 14 (Grievant’s Text Messages).

The Direct Supervisor stated that on multiple occasions he had attempted to coach Grievant regarding his performance, and whereas Grievant would initially be responsive to his coaching, his performance again dropped off. The District Supervisor further noted that Grievant had not been issued Written Notices for every complaint that had been received and that he had received many more complaints than any other of the other Customer Service Generalists currently under his supervision.

Grievant’s Testimony

Grievant did not submit any documentary exhibits as evidence, but his written response to the Agency’s Notice of Intent was included in the documentary evidence that the Agency submitted. See Agency Exhibit 2 (Due Process Notice of Intended Disciplinary Action dated 28 February 2025); Agency Exhibit 3 (Grievant’s Response to Agency’s Due Process Notice of Intended Disciplinary Action dated 6 March 2025).

Grievant’s testimony at the hearing was consistent with his written response to the Written Notice. He acknowledged that he received a significant number of complaints from customers but asserted that there were customers who simply did not appreciate being told “No.” He further noted that one reason for the fact that he received more complaints than other employees was that he saw many more customers than the other employees.

Grievant noted that sometimes customers simply lied about events that occurred and that his supervisor did not protect him from such customers. He particularly noted one complaint in which he allegedly yelled at a customer who was sitting in the waiting room for failing to respond when the customer’s ticket was called. He stated that the customer was clearly lying because the event could not have occurred as the customer stated, but his supervisor failed to support him. He further noted that, on other occasions, he had been insulted and called demeaning names by customers.

In his testimony, Grievant acknowledged that he had not filed grievances on the prior Written Notices because he believed that what he said would not be accepted. Grievant further testified that, notwithstanding the numerous complaints he had received, there were also many instances when customers praised him and communicated to his supervisors regarding his excellence. Grievant further testified that he had made significant and on-going efforts to correct behavior or mannerisms that tended to offend or aggravate customers. Grievant also noted that he was studying Spanish so as to be able to better communicate with customers whose primary language was Spanish.

Grievant requested that his termination be rescinded and that he be assigned to telephone communication only. He noted that he would be most effective as a telephonic communication representative and that if customers complained, a recording would show the truth *vel non* of the customers complaint.

Additional evidence

Agency Exhibit 15 (DHRM Policy 1.60, Standards of Conduct) provides, *inter alia*, that an employee of the Commonwealth of Virginia must:

- Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.
- Resolve work related issues and disputes in a professional manner and through established business processes.
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Comply with the letter and spirit of all state and agency policies and procedures, the Conflict-of-interest Act, and Commonwealth laws and regulations.
- Conduct yourself at all times in a manner that supports the mission of the agency and the performance of your duties.

Agency Exhibit 15.

Agency Exhibit 16 (DHRM Policy 2.35, Civility in the Workplace) ensures that agencies provide a welcoming, safe, and civil workplace for their employees. customers, clients, contract workers, volunteers, and other third parties and to increase awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment. The Policy states in pertinent part that the Commonwealth of Virginia strictly forbids threatening behaviors or behaviors that undermine team cohesion, staff morale, and safety.

Agency Exhibit 11 (Employee Work Profile) dated 1 November 2023 provided the Core Responsibilities on which Grievant was to be evaluated for the coming year along with the percentage of time that would be dedicated to each Core Responsibility and the evaluation criteria for each such Core Responsibility. The Core Responsibilities included:

- Customer Service and Credentialing (40%); Measurement criterion:
 - Receives no more than three written, founded customer complaints; and
 - Follows all agency procedures for document review, approval and imaging
- Operational Efficiency and Productivity (30%); Measurement criterion:
 - Transactions are processed accurately in accordance with agency policies and procedures and meets established auditing standards;
 - All transactions must have an accuracy rate of 90% or higher per month
 - No more than 3 lien omissions during the performance cycle.

- Accountability/Securing DMV Assets and Information (30%). Measurement criteria:
 - Balance cash drawer by limiting number of revenue collection discrepancies according to policy. No more than 3 unidentified overages/shortages monthly.
 - When conducting document preparation, record all errors found on the discrepancy summary and ensures 100% accountability of recorded liens.
 - Ensure all DMV assets and Information are appropriately handled and safeguarded.

Exhibit 12 (Grievant's Employee Performance Evaluation dated 5 December 2024) reported that Grievant's performance over the prior year was substandard. It stated in pertinent part:

[Grievant] has exceeded more than three written customer complaints during this evaluation period. Due to the repetitiveness of customer complaints on 08/31/24 he received a Notice of Potential Disciplinary Action 10/08/24 he was issued a Group I written notice 11/04/24 he was issued a Notice of Potential Disciplinary Action as well as on 11/15/24 he received a Group II written notice. Not only has [Grievant] received complaints from customers but he's also received complaints from his coworkers. Coworkers complained of rudeness towards foreign and African American customers stating that he would interact with them in a very disrespectful manner. His behaviors have become increasingly concerning to his colleagues causing them to feel uncomfortable and scared that a customer will retaliate on the office due to how they've witnessed him scream speak disrespectfully and throw his hands while speaking with customers. [Grievant] does not address difficult transactions or customers effectively.

Agency Exhibit 12.

The evaluation further noted that over the evaluation period Grievant did not communicate in a professional manner and that his communication does not work effectively with most DMV personnel and customers.

The evaluation did note Grievant's strong points, including the fact that he processed transactions in an efficient and timely manner. It noted that Grievant processed an average of 70 customers per day, which was well beyond the minimum required performance level.

The report concluded that notwithstanding the fact that Grievant met the productivity standards, Grievant did not conduct himself at all times in a manner that supports the mission of the Agency and he failed to follow policies such as working with difficult customers or providing excellent customer service. See Agency Exhibit 12.

Analysis and Discussion

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. 1998).

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. See 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.

Evidence presented by the Agency included documentary evidence of multiple instances of Grievant receiving complaints from customers as well as the testimony of his Direct Supervisor regarding Grievant's performance. The evidence also included documentary evidence and testimony from Grievant's co-workers regarding his actions on 7 February 2025. After considering the evidence, including the Grievant's written statement (Agency Exhibit 3) I find that the Agency has proved the misconduct charged in the Written Notice.

Accordingly, and for the reasons detailed above, I find that the Grievant has committed following Group II offenses as alleged in the Written Notice dated 10 February 2025 and such offenses constitutes misconduct:

- Offense Code 11: Unsatisfactory performance
- Offense Code 13: Failure to follow instructions or policy
- Offense Code 36: Obscene or abusive language
- Offense Code 37: Disruptive behavior
- Offense Code 39: Violation of Policy 2.35, Civility in the Workplace

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 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 noted in its documentary evidence that mitigation evidence was considered but, determined that the mitigating evidence did not outweigh the severity of Grievant’s actions. See Agency Exhibit 1.

Grievant acknowledged receiving more complaints from customers than his peers, but he attributed this to a combination of factors including the high number of customers served (he served many more customers than his peers) and bad luck. Grievant further argued that positive reports from customers were not properly considered by Agency management. Grievant asserted that on more than one occasions, customers told his supervisor that he was the best Agency

representative that they had ever dealt with. He further asserted that if these positive reports were considered with the same weight as the complaints, he would not have been terminated.

Grievant further argued that re-assignment would be the better approach for the agency. He stated that he could make the Agency more efficient and effective by serving customers telephonically because he would be able to give customers correct information; he contended that many customers were apparently not being given proper information over the phone since customers frequently came to the Agency with improper understanding of what needed to be done.

Grievant provided no tangible evidence to the effect that he would not receive complaints if he provided telephonic customer representative only. He contended only that his actions were appropriate and recordings from the telephone calls would support his position.

Grievant presented no evidence of extenuating circumstances that could have affected his performance. Whereas Grievant claimed that, on multiple occasions, customers insulted him, he presented no evidence to the effect that he was discriminated against by his supervisors or by the Agency.

Accordingly, having reviewed all the evidence and considered same, I find that 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 II Written Notice, with Termination, 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.

ENTERED: 9 June 2025

A handwritten signature in black ink, appearing to read 'Prescott L. Prince', written over a horizontal line.

Prescott L. Prince, Esq., (VSB# 23077)
Hearing Officer
1901 Huguenot Road, Ste. 200
N. Chesterfield, VA 23235
Telephone: (804) 677-3744
Facsimile: (804) 674-9864
Email: plprince@aol.com