



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12204 / 12206

Hearing Dates: February 12, 2025
February 20, 2025

Decision Issued: May 14, 2025

PROCEDURAL HISTORY

On September 3, 2024, Grievant filed a grievance alleging retaliation regarding a meeting held on August 14, 2024. On November 4, 2024, Grievant was issued a Group II Written Notice of disciplinary action for lack of civility in the workplace. On November 4, 2024, Grievant was issued a Group II Written Notice for failure to follow instructions or policy. On November 4, 2024, Grievant was issued a Group II Written Notice for lacking civility in the workplace and willful misconduct. On November 4, 2024, Grievant was issued a Group II Written Notice for failure to follow instructions or policy. Grievant was removed from employment on November 4, 2024.

On November 4, 2024, Grievant timely filed a grievance to challenge the Agency's disciplinary actions. The matter advanced to hearing.

On November 25, 2024, the Office of Employment Dispute Resolution issued Ruling 2025-5784 consolidating Grievant's September 3, 2024 and November 4, 2024 grievances.

On December 2, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. A prehearing conference was held on December 4, 2024 during which a hearing was scheduled for January 17, 2025. A second prehearing was held on January 17, 2025 during which the Hearing Officer found just cause to continue

the hearing date until February 12, 2025. On February 12, 2025, a hearing began by video conference. A second day of hearing was held on February 20, 2025.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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?
5. Whether the Agency retaliated against Grievant because of her disability?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant was warranted and appropriate under the circumstances. The employee 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.

FINDINGS OF FACT

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

The Department of Environmental Quality employed Grievant as an FIOA Technician at one of its locations. She had been employed by the Agency since 2019.

When the Agency received requests for documents under the Virginia Freedom of Information Act, Grievant was responsible for conducting searches of Agency records and then processing the requests to ensure that documents were presented to the persons making the request. Grievant worked well with employees outside of her unit. Grievant provided services to other employees in the Agency and was respected and liked by those employees.

Grievant and three other employees reported to Supervisor. Supervisor reported to Manager.

On October 22, 2022, Grievant received an overall rating of Extraordinary Contributor on her 2022 annual performance evaluation.

Grievant worked from home during COVID. When Grievant was asked to return to the workplace, she suffered symptoms of anxiety which affected her work performance.

Grievant filed an Employee Request for Accommodation Form with the Agency. On February 22, 2023, Grievant's Licensed Professional Counselor sent the Agency's HR Director a letter:

[Grievant] has been under my professional care for many years. She is an extremely bright, talented, and responsible woman who has suffered from a diagnosed anxiety disorder throughout her adult life. Over the past several years, during which time [Grievant] has been working as an FOIA Technician she has been able to primarily telework. This has proved immensely helpful to her general mental health and overall mental stability. *** It is clear to me that recent requirement to decrease her telework option and increase her return to in person work has contributed to a significant increase in her mental anxiety and level of distress. It seems clear to me that the ability to continue to telework is in her best medical and mental health interests and I would strongly encourage that she be allowed to do so under the accommodations allowed by the Americans with Disabilities Act.¹

Grievant requested an accommodation to telework four days based on her disability. On April 14, 2023, the HR Director sent Supervisor an email advising the HR had completed its review of Grievant's accommodation request. HR Director advised Supervisor that the request for four days of teleworking had been approved.

On April 18, 2023, Grievant sent Supervisor an email, "I appreciate the reminder that I don't have to work while using my sick leave. Due to my disability, it is easier for me

¹ Agency Exhibit p. 114.

to get work done on sick days than in the office, so I am choosing to do this to not let the team down.”²

On May 30, 2023, HR Director sent Supervisor an email advising that the Agency has approved Grievant’s request for accommodation for three days to telework.

On May 31, 2023, Grievant received approval for a regular weekly schedule of three remote-work days and two in-office days.

Grievant received an overall rating of Contributor on her October 4, 2023 annual performance evaluation. Grievant sought to meet with the Supervisor:

I am concerned that the nature of the medical issues that have led to ADA adjustments to my work schedule are not fully understood and that this has contributed to confusion/uncertainty around expectations in the workplace which it would be helpful to clarify.³

The Agency used a spreadsheet to monitor progress on FOIA requests. Several employees could access and use the spreadsheet at the same time. It was located on the Agency’s common drive accessible in OneDrive. When properly configured, the spreadsheet automatically saved each entry into the spreadsheet. It was not necessary for an employee to manually save information to update the spreadsheet.

On some occasions, the FOIA spreadsheet did not update information automatically. This frustrated Grievant and she began creating a copy of her work as well as working from the copy and later uploading the copy to the FOIA spreadsheet on the common drive.

On March 7, 2024, Supervisor sent Grievant an email:

As discussed, it is expected for you to work out of the FOIA spreadsheet directly from the common drive in SharePoint while you are working FOIAs so we can actively see changes without delay. It's important that at any moment I can see in real time our FOIA progress and if you need assistance. If you would like to keep a copy as a back for you that's fine.⁴

On March 7, 2024, Grievant sent Supervisor an email:

Absolutely! Now that I know that the version I was working off of does not sync correctly, I will definitely use the version you showed me today, and try to keep both updated. I wonder when that changed, or if it had anything

² Agency Exhibit p. 255.

³ Agency Exhibit p. 284.

⁴ Agency Exhibits p 64.

to do with my new computer. So many things and settings that I had to reset today (again). Let me know if you have any issues accessing the spreadsheet so we can always be on the same page.⁵

Grievant sent Supervisor an email indicating, "I was accessing it through Sharepoint, not OneDrive, so I guess that's where the problem was."⁶

On March 8, 2024, Supervisor sent Grievant an email, "you access the common drive in SharePoint through OneDrive."⁷ Supervisor wrote, "First access SharePoint and select OneDrive."⁸

On April 2, 2024, Supervisor sent Grievant an email:

Please remember to work on the FOIA spreadsheet on real time from the Onedrive on Sharepoint. As of 1:53 p.m. the spreadsheet has not been updated for 2 hrs and after checking the foia inbox it shows that you have responded to two FOIAs that are not logged in the spreadsheet as complete it. FOIA 716-24-1137 and 716-24-1138.⁹

On April 2, 2024, Grievant replied, "Absolutely, I know you like to know exactly what I am doing to the minute, so I make sure to save the master copy on the common drive as soon as I hit Send - I got myself trained now!"¹⁰ Supervisor perceived Grievant's response as "passive-aggressive."

The Agency wanted to have Administrative Support Specialist serve as a back up to Grievant when Grievant was on vacation. Supervisor assigned Grievant with responsibility to train Administrative Support Specialist which involved selecting FOIA requests for Administrative Support Specialist to practice completing. Supervisor wanted Administrative Support Specialist to begin with redoing already completed FOIA request and then advance to real or live FOIA requests.

On April 11, 2024, Supervisor sent Administrative Support Specialist an email with a copy to Grievant:

As discussed, since you already have the access required to work on FOIAs I would like for you to work on your own, following the FOIA training manual

⁵ Agency Exhibits p. 399.

⁶ Agency Exhibits p. 396

⁷ Agency Exhibits p. 124.

⁸ Agency Exhibits p. 386.

⁹ Agency Exhibits p. 60.

¹⁰ Agency Exhibits p. 290.

and pretend to complete FOIAs 716-24-1169, 716-24-1159 and 716-24-1154. This with the purpose of giving you hands on training before you start working on real FOIA requests. Please report back on how you did with this three requests.¹¹

On April 11, 2024, Grievant sent Supervisor an email:

Can we speak about this in our weekly FOIA meeting tomorrow, before [Administrative Support Specialist] starts anything? I was telling her that I would like to process at least one FOIA together with her before she starts going in there on her own. I was hoping that we could meet to do this on Monday. I have compiled a list of good practice requests for her (which are a little easier than the ones you picked), and they each reflect something that I usually point out in our training process together. But since we have not done one together yet, I was hoping we could do that before I sent her the practice examples. Is that okay? What are your thoughts?¹²

On April 24, 2024, Grievant received a Notice of Improvement Needed/Substandard Performance for Attendance/Readiness to Work and failure to follow supervisor's instruction and accomplish assigned tasks. She was also counseled regarding DHRM Policy 2.35, Civility in the Workplace and DEQ Mission and of Ethics. Her Improvement Plan required her to report to work as scheduled and perform the duties in her employee work profile. She was expected to communicate with co-workers and supervisors to stay apprised of office needs when she was working in the office. She was to communicate any concerns to the supervisor. She was expected to follow procedures concerning FOIA requests and administrative duties. She was expected to work "directly from the FOIA spreadsheet on OneDrive in SharePoint so that at any given moment [the] supervisor can assess the status of the FOIAs and needs." Grievant was instructed, "[c]ommunication exchange with supervisor and coworkers must be appropriate, respectful, and professional at all times."¹³

On April 24, 2024, Supervisor sent Grievant an email, "based on what I see on SharePoint, you are saving a copy. *** If you work directly from SharePoint spreadsheet online, this should not happen. The system automatically saves your changes." Grievant replied, "I am working directly from the Sharepoint copy."¹⁴

On April 26, 2024, Grievant notified Supervisor that she tried to save a document on the spreadsheet, but the system responded, "Document not saved." Grievant wrote that she had lost all of her work and had to recreate it. On April 29, 2024, Grievant notified

¹¹ Agency Exhibits p. 32.

¹² Agency Exhibits p. 32.

¹³ Agency Exhibit p. 100.

¹⁴ Agency Exhibit p. 138.

Supervisor that she attempted to access the FOIA spreadsheet and received an error message, "Upload Failed." On April 29, 2024, Supervisor sent Grievant an email, "please reboot your computer and access the [FOIA] spreadsheet created on March 14, 2023 directly from SharePoint on DEQnet. The file should open on a browser automatically. Please do not open from a desktop app, only the browser. Once you have access to the original sheet (March 14, 2023), please make sure it is up to date and delete the one created three days ago."¹⁵

On April 30, 2024, Supervisor sent Grievant an email, "[p]lease see changes to the [FOIA] spreadsheet. This should eliminate any issues. Please always open the spreadsheet in the browser, not the client app. The autosave should always be set to ON." Approximately an hour later, Grievant sent Supervisor an email about an error message saying two files could not be uploaded into OneDrive.

On May 14, 2024, Supervisor sent an email to Grievant with a copy to [Administrative Support Specialist]:

1. [Administrative Support Specialist] please finalize the three FOIAs previously assigned by tomorrow Wednesday May 15th.
2. [Grievant] please assign three more practice FOIAs for [Administrative Support Specialist] to complete by tomorrow May 15th.
3. [Administrative Support Specialist] please complete FOIAs assigned tomorrow by next Wednesday May 22nd.

Please note that [Administrative Support Specialist] will start working on REAL FOIA requests on June 3rd, 2024. [Administrative Support Specialist] will ask [Grievant] for three FOIAs on the Friday of each week starting on May 31st. FOIAs assigned need to have a deadline of Wednesday or Thursday of the following week to give her ample time to complete.¹⁶

Grievant questioned whether the June 3rd date should be delayed. Supervisor responded on May 16, 2024:

I understand what you are saying but she needs to get used to start working on FOIAs that require her to prioritize her time and have a deadline. Your vacation time is a month from the start date, that should give her ample time to have you around to ask questions. Regardless ... she will work on the FOIAs and before she sends them out you are going to revise her draft and responsive records to respond to the requester.¹⁷

¹⁵ Agency Exhibit p. 123.

¹⁶ Agency Exhibits p. 28.

¹⁷ Agency Exhibit p. 297.

On May 16, 2024, Supervisor sent Grievant an email stating, "I am leaving the assignment of FOIAs to you based on what you see she needs help with and also since you mentioned previously that you had a list of tricky [FOIAs] that would be good for her to practice."¹⁸

On May 24, 2024, Supervisor sent Grievant an email asking Grievant to assign three practice FOIA files to Administrative Support Specialist.

June 10, 2024

On June 10, 2024, Supervisor looked at the sent folder in the FOIA inbox. She noticed that Grievant had worked on three FOIA requests, but the FOIA spreadsheet did not reflect those changes. The FOIA spreadsheet showed the last version was saved by Grievant on June 7, 2024 at 5:38 p.m. Grievant began working at 9:04 a.m. on June 10, 2024. She was responsible for working on three FOIA requests. At 1:37 p.m., Supervisor observed that Grievant had not updated the FOIA spreadsheet on OneDrive. Supervisor concluded Grievant was not entering information directly into the FOIA spreadsheet as instructed.

July 24, 2024

On July 24, 2024, Grievant, Supervisor, and Administrative Support Specialist met with the FOIA Officer regarding changes in Agency procedures. The FOIA Officer discussed the changes in procedures including refraining from offering and searching addresses not noted in the request. Grievant did not like the changes because the changes were contrary to the Agency's longstanding practice. Grievant expressed her dislike of the changes.

August 7, 2024

On August 7, 2024 at 9:31 a.m., Supervisor sent an email to the Administrative Support Specialist with a copy to Grievant stating:

Please select two more FOIAs to work on this week, hopefully that it has records so you can continue getting the practice you need. Please respond back to this email with the selected FOIAs.¹⁹

Administrative Support Specialist was seated near Grievant. Grievant said to Administrative Support Specialist, "I would be very careful with which ones you pick. Some of them are very complicated. Here, let me pick some easy ones for you." Grievant sent Administrative Support Specialist two selections via Teams chat. Administrative Support Specialist told Grievant that Supervisor wanted Administrative Support Specialist

¹⁸ Agency Exhibits p. 297.

¹⁹ Agency Exhibit p. 15.

to work on complicated requests. Grievant replied, “[t]here isn’t any point in having your work on complicated ones when we’re going to be changing systems anyway.” Administrative Support Specialist told Grievant, “ok”.

Administrative Support Specialist replied to Supervisor with a copy to Grievant on August 7, 2024 at 9:48:

716-25-0159 and 716-25-0161 - Both due tomorrow.²⁰

On the following day Administrative Support Specialist told Supervisor that she had not selected the two FOIAs as Supervisor had asked.

August 13, 2024

On August 13, 2024 at 1:41 p.m., Supervisor sent an email to Grievant and other staff:

Good afternoon all, [Grievant] asked [me] to send an email to all reiterating my instructions to [Administrative Support Specialist] noted on the email from May 15th where I am asking [Administrative Support Specialist] to start completing real time FOIAs. [Administrative Support Specialist] is to choose two to three FOIAs a week, communicated with [Grievant] so she is aware of what [Administrative Support Specialist] is working on and for [Grievant] to alert her of any hot topic foias. [Administrative Support Specialist] will then process the FOIA request the same way [Grievant] does and respond directly to the requester. [Administrative Support Specialist] **is no longer in practice mode**. She will continue to stay in communication with [Grievant] in case she has question or concerns. (Emphasis added.)²¹

Supervisor met with Administrative Support Specialist in the afternoon. During the meeting, Grievant sent Administrative Support Specialist several instant messages.

Grievant: Okay, before I forget, for your practice ones this week, use the requests in the 'to be uploaded' folder and send your responses just like you would to [Ms. I], but send them to me.

Grievant: I'm super duper caught up this week, so I've already sent [Ms. I] the files, but for your practice, do everything the same and just put my email in the recipient line - sound good?

Administrative Support Specialist: Hi! So, you already did them? I thought I was completing them like I did last week in real time?

²⁰ Agency Exhibit p. 15.

²¹ Agency Exhibits p. 23.

Grievant: Yep! You can do the exact same process as before, just put me in the To line.

Administrative Support Specialist: So, maybe this is something you need to talk to [Supervisor] about. She doesn't want me practicing, I'm supposed to complete them in real time. She's going to ask me about them. What do I tell her?

Grievant: oh crap, really? I was thinking this was practice - is there a reason they need to be 'real time'?

Grievant: Tell her you completed the two you sent to me? Do you think that will be a problem? You still completed the whole process, from start to finish, right?

Grievant: Ugh, shoot, I didn't even think about that.

Grievant: Or, we could just pretend I never said anything and you could just send them to [Ms. I] again, lol, it won't hurt her to get them twice, right?

Administrative Support Specialist: Yeah, not practicing.

Grievant: but, like, what does that mean? Why can't you do the whole thing and send it to me?

Grievant: You'd still learn the whole process, right?

Administrative Support Specialist: Remember, [Supervisor] said that I am your back up. I can't get in trouble [Grievant].

Grievant: Of course not! I would never get you in trouble!

Grievant: Ok, I'll do whatever you want, just tell me how to help!

Administrative Support Specialist: I know. Just let [Supervisor] know you did them. Maybe she'll have you assign me other ones.

Grievant: Oh, sure, no prob, I can do that! Will keep you posted to what she says. Ok, you are good! Off the hook completely! Will keep you posted on a decision for next week's requests.

Administrative Support Specialist: Sounds good!

Grievant: You're good, right? She didn't yell at you for anything right? well, anything foia-related I mean, lol. can't help ya with the other stuff, lol.²²

Administrative Support Specialist understood Grievant to be saying that Grievant had worked already on two FOIAs that Grievant assigned to Administrative Support Specialist. Administrative Support Specialist was confused by Grievant because the Administrative Support Specialist knew she was supposed to be working independently including selecting two or three FOIAs and completing them. Administrative Support Specialist was to send those FOIA requests directly to the requester. When Administrative Support Specialist expressed her concerns to Grievant about Grievant's suggestions, Grievant told Administrative Support Specialist to tell Supervisor that Administrative Support Specialist was doing the FOIAs and getting practice by sending them to Grievant instead of the requester.

August 14, 2024 Meeting

On August 14, 2024, Manager, Supervisor, and Grievant met to discuss the status of Grievant's Notice of Needs Improvement/Substandard Performance and present her with an Interim Evaluation.

Grievant's August 14, 2024 Interim Evaluation indicated that Grievant "has significantly improved her attendance" and on-time arrivals and "has not called out on the days that she is scheduled to be at the office." The form noted the following ongoing goals:

- 1) Follow supervisor's instructions and avoid interfering with supervisor's instructions to other teammates.
- 2) Communicate with your team in an appropriate, respectful and professional manner, both online and in-person, to adequately determine office needs and workloads. . . .
- 3) Develop[] effective working relationships and promote[] teamwork and agility in response to challenges. This entails[] making yourself available to the team without supervisors prompting.

In addition, the form identified the following areas for improvement: "Communicate with the team in other ways than via [Microsoft T]eams. Take advantage of in office days to build a professional working relationship with your co-workers, request day-to-day information to co-workers and supervisor, be involved in the daily administrative duties not only when prompted by supervisor."²³

²² Agency Exhibits p. 526.

²³ Agency Exhibits p. 90.

During the meeting, Grievant often did not make eye contact with Supervisor. Supervisor perceived this as disrespectful behavior.

Supervisor had to ask Grievant several times to allow Supervisor to speak because Grievant was “talking over” Supervisor when Supervisor was giving instructions. Grievant said Supervisor’s instructions were not clear, but Grievant was not allowing Supervisor to finish her statements and was interrupting Supervisor.

When Grievant spoke, she only referred to Manager. Grievant said she would go to Manager when she had questions. Manager said Grievant needed to go to Supervisor first since Supervisor was Grievant’s direct supervisor. Grievant responded sarcastically, “Sure, I will copy [Supervisor] in all communication.”

Grievant raised her voice during the meeting such that another employee outside of the meeting room could hear Grievant.

2024 Annual Performance Evaluation

Grievant received an overall rating of Below Contributor on her October 28, 2024 annual performance evaluation. This rating was based on two “Below Contributor” sub-ratings, including in the category comprising 70 percent of her job. In that category, the rating was attributed to “the backlog of files not in [the agency’s records management system], lack of communication with supervisor, failure to follow supervisory instructions, and by creating a challenging learning environment for her peers.” In the other “Below Contributor” sub-category relating to support of agency objectives, it was noted that Grievant “has faced challenges in developing effective working relationships with her supervisor and teammates.”

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “generally have a minor impact on agency business operations but still require intervention.”²⁴ Group II offenses include, “acts of misconduct, violations of policy, or performance of a more serious nature that significantly impact the agency’s services and operations.” Group III offenses include, “acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations.”

DHRM Policy 2.35 governs Civility in the Workplace. Under this policy, any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct. This policy is to ensure that agencies provide a welcoming, safe, and civil workplace for their employees ... and to

²⁴ DHRM Policy 1.60, Attachment A.

increase awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment. Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.

The Civility in the Workplace policy defines prohibited conduct in general terms. Disciplinary actions to address prohibited behaviors may be taken on a progressive basis or actions may be taken upon the first occurrence, depending upon the nature and seriousness of the conduct. The context of the behaviors, nature of the relationship between the parties, frequency of associated behaviors, and the specific circumstances must be considered in determining if the behavior is prohibited. A “reasonable person” standard is applied when assessing if behaviors should be considered offensive or inappropriate.

Prohibited Conduct/Behaviors may include, for example, (1) demonstrating behavior that is rude, inappropriate, discourteous, or unprofessional, (2) behaving in a manner that displays a lack of regard for others, (3) making disparaging remarks, (4) raising one’s voice inappropriately or shouting at another person.

Any employee who engages in conduct prohibited under DHRM Policy 2.35 shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Group II – Failure to Follow Instructions (August 7, 2024)

Failure to follow instructions is a Group II offense.²⁵ On August 7, 2024, Supervisor instructed Administrative Support Specialist to “select two more FOIAs to work on this week.” Grievant was copied on the email. Grievant undermined Supervisor’s instruction by selecting two easy FOIAs for Administrative Support Specialist to complete. Grievant disregarded Supervisor’s instruction thereby justifying the issuance of a Group II Written Notice.

Grievant asserted that Administrative Support Specialist approached her and asked Grievant help her find to easy requests. Administrative Support Specialist denied Grievant’s version of events. Her denial was credible and supported by her written statement.

Group II – Failure to Follow Instructions (June 10, 2024 and August 14, 2024)

Failure to follow instructions is a Group II offense.²⁶

²⁵ See, Attachment A, DHRM Policy 1.60.

²⁶ See, Attachment A, DHRM Policy 1.60.

Supervisor instructed Grievant to access the FOIA spreadsheet and enter information directly into the spreadsheet. Grievant experienced numerous problems with the spreadsheet not saving information she entered so she began entering information into a copy of the spreadsheet and then uploading the copy into the FOIA spreadsheet. This affected the information other employees had entered into the spreadsheet. Supervisor again instructed Grievant to enter information directly into the spreadsheet.

Grievant saved the FOIA spreadsheet on June 7, 2024 at 5:38 p.m. On June 10, 2024, Supervisor observed the FOIA inbox and realized that Grievant had worked on three spreadsheets after June 7, 2024 at 5:38 p.m. Supervisor concluded Grievant failed to work directly from the FOIA spreadsheet and disregarded her instruction. Supervisor's conclusion is supported by the written and oral evidence. The Agency has presented sufficient information to support its allegations that Grievant failed to follow instructions regarding entering information into the FOIA spreadsheet.

Grievant argued that once Supervisor logged out and logged back in, she could see the updated FOIA spreadsheet. The evidence is not sufficient to establish this defense.

Group II – Civility in the Workplace, Misconduct (August 13, 2024)

On August 13, 2024, Supervisor sent Administrative Support Specialist an email with a copy to Grievant instructing that Administrative Support Specialist was to: (1) start completing FOIAs in "real time", (2) chose two to three FOIAs a week, (3) tell Grievant what she is working on, (4) process FOIAs the same way Grievant did, and (5) respond directly to the requester. Supervisor said that Administrative Support Specialist was no longer in practice mode.

On August 13, 2024, Grievant instructed Administrative Support Specialist to: (1) use the FOIA requests in the uploaded folder and send her responses to Grievant, (2) do everything the same, but put Grievant's email in the recipient line, (3) tell Supervisor that Administrative Support Specialist completed the two FOIA sent to Grievant, and (4) they could pretend Grievant never said anything and send the FOIAs to Ms. I a second time.

Grievant initially was under the impression that Administrative Support Specialist was still practicing. Administrative Support Specialist told Grievant that Supervisor, "doesn't want me practicing, I'm supposed to complete them in real time. She's going to ask me about them. What do I tell her?"

Grievant undermined Supervisor's instruction to Administrative Support Specialist who felt uncomfortable with Grievant's behavior. Grievant suggested Administrative Support Specialist should "pretend" and tell Supervisor something other than the truth. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Group II – Civility in the Workplace (August 14, 2024)

Grievant met with Manager and Supervisor on August 14, 2024 to discuss Grievant's Interim Evaluation. During the meeting, Grievant was disrespectful to Supervisor by talking over Supervisor and refusing to stop that behavior when Supervisor asked Grievant to allow Supervisor to speak. Grievant disregarded Supervisor's authority by saying she would go to Manager with her questions. When Manager told Grievant she needed to go to her supervisor first, Grievant replied, "Sure, I will copy [Supervisor] on all communications." Grievant raised her voice during the meeting such that another employee outside of the meeting room could hear Grievant.

Grievant's behavior was rude, discourteous, and unprofessional. Grievant displayed a lack of regard for Supervisor's authority while raising her voice.²⁷ The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for lacking civility in the workplace.

Grievant argued that Supervisor and Manager trapped her and antagonized her. Although the meeting was confrontational, the evidence is not sufficient for the Hearing Officer to conclude that Supervisor and Manager improperly provoked Grievant's behavior.

Removal

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated four Group II Written Notices. Accordingly, Grievant's removal must be upheld.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"²⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. 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

²⁷ Grievant explained that she raised her voice so someone outside could hear her concerns. Although Grievant's motive was as a call for assistance, it was not appropriate for Grievant to raise her voice during the meeting.

²⁸ Va. Code § 2.2-3005.

action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant's Defense under the Americans with Disabilities Act

Grievant requested and received accommodation for a diagnosed anxiety disorder. Her disability affected her desire to go to the workplace and her ability to work with co-workers. Grievant's disability had a role in her behavior that gave rise to disciplinary action. For example, during the August 14, 2024 meeting with Supervisor and Manager, Grievant felt trapped and abused which heightened her anxiety. She was unable to look at Supervisor. She began yelling with the hope that someone outside of the room would hear her protest.

Although some of Grievant's behavior giving rise to disciplinary action can be explained by her disability, her disability does not prohibit the Agency from taking disciplinary action. In *Sigley v. ND Fairmont LLC*, 120 F.4th 256, 261 (2025), the Court held:

But this Court has long recognized that "misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis." ***

In other words, "[t]he ADA does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition."

Accordingly, the Agency was free to take disciplinary action against Grievant even though some of her behavior was caused by her disability.

Grievant's Claim of Hostile Work Environment

Grievant filed a grievance following her August 14, 2024 meeting with Supervisor and Manager. Grievant asserted she was asked to step outside of her comfort zone regarding in-person social encounters in the office, she was expected to be observed interacting with more people on days when she was in the office, she was to make an extra effort to physically seek out her co-workers in the office each day, and work harder to create additional face-to-face physical connections in her social relationships with people she encountered. Supervisor expected this of Grievant.

An agency may place restrictions and expectations on an employee whose interactions with co-workers are negative and undermining the Agency's ability to complete its responsibilities. The Agency's expectation that Grievant communicate with co-workers and supervisors to stay apprised of office needs was a reasonable request. In this case, however, the Agency expected Grievant to take affirmative steps to build and

enhance her relationships with co-workers.²⁹ In essence, the Agency wanted Grievant to be more popular in the workplace even though becoming more popular would have no effect on her work performance and only minimally affect the work performance of other employees. Grievant's anxiety disability was exacerbated by heightened contact with other employees in the workplace. This is why Grievant's health professional wanted Grievant to be able to telework and avoid co-workers. The Agency, in essence, created a task for Grievant to have personal (not only professional)³⁰ interactions with co-workers. That task was not created for other employees and was not part of her employee work profile. The Agency's expectation was unreasonable given Grievant's anxiety disability. There is no basis for relief, however, because Grievant's is not being reinstated to her position.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of four Group II Written Notices of disciplinary action with removal is **upheld**. Grievant's request for relief under her September 3, 2024 grievance is **denied** as moot.

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.

²⁹ It is not clear that Supervisor retaliated against Grievant because of Grievant's disability. Regardless of whether the Agency's expectation that Grievant build social relationships was retaliatory for requesting an ADA accommodation, the request was unreasonable in light of Grievant's disability.

³⁰ Grievant effectively communicated with co-workers regarding her FOIA requests. She was respected for her expertise in the FOIA process.

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]

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.