



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12216

Hearing Date: March 11, 2025

Decision Issued: May 8, 2025

PROCEDURAL HISTORY

On November 7, 2024, Grievant was issued a "Final Disposition, Group III Termination" memorandum (the Group III Termination Memorandum).¹ The Group III Termination Memorandum described its purpose as providing a final disposition of a Group III termination for "disruptive behavior/disruption of the workplace and overall loss of confidence to perform as the Staff Training Coordinator." The Group III Termination Memorandum noted that Grievant's termination was effective November 9, 2024.

On December 4, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 2, 2025, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On March 11, 2025, a hearing was held at Agency facilities in Virginia Beach, Virginia.

APPEARANCES

Grievant
Grievant's Counsel
Agency's Counsel
Witnesses

¹ Grievant Ex. at 10-11, Agency Ex. at 105-107.

ISSUES

1. Whether Grievant engaged in the behavior described in the Group III Termination Memorandum?
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

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 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 Agency operates a Program on a campus to provide a residential, quasi-military alternative educational program for eligible Virginia teenagers.

Prior to her dismissal, Grievant was the Staff Training Coordinator for the Program. Grievant worked for the Agency in the Program for more than ten years. Evaluations of Grievant's work performance for the performance periods ending in October 2021, October 2022, and October 2023, indicated that Grievant's overall performance was satisfactory to the Agency.²

² Grievant Ex. at 58-60, 62-64, 74-76. The performance evaluation for the performance period ending in October 2023 referenced that Grievant had received a "Needs for Improvement focused on obtaining CPR Qualification, HWC standards being trained to, Staff Training Documentation complete and better coordination with the Commandant ensuring staff are fully qualified prior to being assigned a task."² That same Performance Evaluation, however, rated Grievant as an overall Contributor and did not identify any specific area where Grievant was rated Below Contributor. The referenced "Needs for Improvement" was not entered into evidence and there was no evidence as to a performance plan related to the referenced "Needs for Improvement," the period of any performance plan, any evaluation of Grievant's progress with respect to that "Needs for Improvement," or the conclusion and evaluation of any improvement plan related to that "Needs for Improvement." Grievant Ex. at 58-60.

Director began supervising Grievant after Director became Director of the Program in February 2024.

On September 24, 2024, Grievant received a “Final Disposition, Verbal Counseling” memorandum dated September 13, 2024. The Verbal Counseling memorandum set forth specific expectations regarding the process for Grievant to communicate and request leave as well as expectations regarding Grievant’s assessment and communication of staff training needs, planning for in-service training, and communication and planning for new employee training.³

Director provided Grievant with a memorandum of “Intent to Pursue Group III Disciplinary Action” (Group III Intent) dated October 4, 2024.⁴ The only copy of the memorandum included as evidence was unsigned, however, both Director and Grievant testified that Director provided the memorandum to Grievant and they met to discuss the Group III Intent on or about October 8, 2024.⁵ The stated purpose of the Group III Intent memorandum was to provide notice to Grievant that Director was considering disciplinary action, including termination, “for disruptive behavior/disruption of the workplace” based on a report that Grievant:

solicited the attention of 3 or more staff members and or outside contract employees to discuss confidential information from department lead meetings that you attended to those that should not be the recipient, made statements with the intent to impugn one’s reputation through gossip, retaliated against your supervisor, and demonstrated behavior that is rude, unprofessional and displays a lack of regard for others. The communication you had with others during the workday significantly disrupted your work completion and my work completion for the work week. Communication that serves to challenge or resist managerial/supervisory authority; gas-lighting colleagues or leaders through gossip, insults, rudeness and criticisms can be considered as a violation of the Civility in the Workplace Policy and significantly impact the [Program’s] services and operations.⁶

The Group III Intent memorandum also noted Director’s concern that because Grievant was spending time “demonstrating discourteous and unprofessional behavior,” Grievant had not made progress on core measures from her Employee Work Profile. A specific performance failure identified was that Grievant “did not perform training scheduled on 9/20 and 9/24 for new employees, out of compliance employees and those in which expired on 9/29.”⁷

On or about October 11, 2024, Director issued to Grievant a “Final Disposition, Group I Disciplinary Action” memorandum (Group I Memorandum).⁸ Although the

³ Agency Ex. at 25-26.

⁴ Grievant Ex. at 49-50.

⁵ Hearing Recording at 2:56:10-3:02:46, 7:26:44-7:27:34.

⁶ Grievant Ex. at 49-50.

⁷ Grievant Ex. at 49-50.

⁸ Agency Ex. at 15-16.

memorandum included as evidence was unsigned,⁹ both Director and Grievant testified that the Group I Memorandum had been provided to Grievant.¹⁰ The stated purpose of the Group I Memorandum was to provide final disposition of the issuance of a Group I disciplinary action for “failure to appropriately coordinate and manage training in accordance with the [national program manual] and Agency requirements set forth in [Program] SOP 11.” The Group I Memorandum specifically cited Grievant’s failure “to hold training scheduled on 9/20 and 9/24 for new employees and those that will expire on 9/29 and 10/30” and noted that training was held instead on 10/8 and 10/10. The Group I Memorandum also specifically considered prior performance issues with respect to Grievant’s training responsibilities as follows:

While this is the first time I have had to investigate and address this issue, you have participated in corrective action conversations from [Agency] leadership previously. In December 2022, while as the [Program State Training Coordinator], it was found that [Program] staff members had not completed training and or training was not documented. [Agency] provided training in January 2023 and senior leadership expressed the importance of this requirement. In the January [Agency] inspection it was documented that there was no improvement in the training deficiencies that were previously noted from December; the [Supplemental Course] had not been completed or implemented and a CDL tracker was incomplete. I recognize that a previous director presided over [the Program] prior to October 2023.¹¹

The Group I Memorandum also appeared to provide a plan for improvement going forward by noting that Director would be

meeting with [Grievant] regularly to assess the needs of the cadets and staff during our STC/Director meeting. Part of this conversation will be reporting out data that you have entered and what you need department leaders to track of their team. We will also plan in-services to ensure training does not lapse.¹²

On Thursday, October 17, 2024, Director and Witness-9 had a conversation about Witness-9’s plans for Grievant to drive a bus for Witness-9 and a group of cadets to attend a class at Community College on Friday, October 18, 2024. Director advised Witness-9 that she was concerned about Grievant’s ability to drive the bus on October 18th because of Grievant’s training responsibilities for some new employees.¹³ Director did not

⁹ This Hearing Officer notes that the Agency’s process for issuing discipline and the discipline itself may have been clearer to all parties if the Agency utilized DHRM’s written notice form as its primary mechanism for final issuance of discipline including ensuring that appropriate signatures are received (or the signature of a witness acknowledging a refusal to sign) and appropriate distinctions are made as to the Agency’s consideration of mitigating and aggravating factors, including the context by which prior discipline is considered. Primary utilization of the DHRM form also might provide a clearer and more concise mechanism for setting forth the specific charges of misconduct for each disciplinary action.

¹⁰ Hearing Recording at 1:37:18-1:44:17, 7:38:09-7:38:34.

¹¹ Agency Ex. at 15-16.

¹² Agency Ex. at 15.

¹³ Hearing Recording at 2:05:04-2:07:30, 3:14:32-3:19:33, 6:23:45-6:27:08.

communicate with Grievant about her conversation with Witness-9 or her concerns with Grievant driving the bus on October 18th. Director did not tell Witness-9 or Grievant that Grievant was prohibited from driving the bus on October 18th.

At some point following her conversation with Director, Witness-9 spoke with Grievant to confirm that Grievant would be able to drive the bus for the cadets and advised Grievant of Director's concern that Grievant had training obligations on October 18th. Grievant told Witness-9 that Director was confused because the new employees that required training could not be trained by Grievant on October 18th because those new employees would not be reporting to work on that date.¹⁴ Grievant did not follow-up with Director after Grievant's conversation with Witness-9 to correct Director's understanding about the unavailability of the new employees for training on October 18th or to confirm that Grievant would be working offsite on that day.

On Friday, October 18, 2024, Grievant drove the bus to transport Witness-9 and the cadets to the Community College. Grievant left the Program campus at around 9:00 am and stayed off-site until the cadets had finished their class. While Grievant was offsite, at 10:03 am, Director sent an email to Grievant requesting that they meet that day.¹⁵ At some point later that day, while Grievant was still offsite, Director texted Witness-9 and asked Witness-9 if Grievant was with Witness-9. Witness-9 replied to Director's text and confirmed that Grievant had driven the bus and was with Witness-9. Witness-9 told Grievant about the text from Director and suggested that Grievant call Director. Grievant had to drive the bus to transport Witness-9 and the cadets back to the Program campus. Grievant decided to wait and speak with Director after she returned to the Program campus that day.¹⁶ Grievant drove Witness-9 and the cadets back to the Program campus and arrived back on campus around 2:30 pm.

On Saturday, October 19, 2024, the Program hosted Family Day for the Program's cadets and their families. The Program regularly hosted a Family Day for each class of cadets. Family Day was described as an opportunity for the cadets' families to visit the cadets, meet the Program staff, and enjoy fun activities with the cadets, other cadet families, and staff. All Program staff were required to attend Family Day. All Program staff were required to be on the Program campus by 12:30 pm for the October 19, 2024 Family Day. Grievant did not request leave or receive approval to take leave on Family Day. Grievant did not arrive at the Program campus by 12:30 pm on Family Day. Grievant arrived at the Program campus an hour or more later between 1:30 and 2:00 pm.¹⁷

On October 22, 2024, Director electronically signed a "Final Disposition, Group III Termination" memorandum dated October 18, 2024 (the October G3 Memorandum).¹⁸ Although the memorandum was addressed to Grievant, it was not signed by her. Grievant testified that she received this memorandum by email on or about October 22, 2024.¹⁹ The Agency included with its exhibits a DHRM form written notice that was electronically

¹⁴ Hearing Recording at 6:23:45-6:27:08, 8:05:35-8:08:34.

¹⁵ Agency Ex. at 103.

¹⁶ Hearing Recording at 6:23:45-6:27:08, 8:05:35-8:08:34.

¹⁷ Hearing Recording at 1:44:17-1:52:43, 2:07:30-2:12:14, 8:00:15-8:05:35.

¹⁸ Agency Ex. at 5-6.

¹⁹ Hearing Recording at 7:09:21-7:17:35.

signed by Director, but Grievant testified she did not receive that form until the Agency produced documents during this grievance process. That DHRM form identified the specific conduct for which Grievant was charged as: Violation of Civility in the Workplace Policy (#39) and (#37) disruptive behavior to cause loss of confidence and (#56) insubordination.”²⁰ The memorandum noted that Grievant was terminated effective October 25, 2024.

The October G3 Memorandum was issued to Grievant approximately 11 days after the date of the Group I Memorandum that was issued to Grievant related to Grievant’s performance as the Staff Training Coordinator.

Based on the information provided during the hearing, it appeared that rather than terminating Grievant following Director’s issuance of the October G3 Memorandum, the Agency placed Grievant on administrative leave and an Agency human resource manager requested that Director meet with Grievant and the human resource manager to discuss the Agency’s intention to terminate Grievant from employment. Director, Grievant, and the human resource manager met on November 6, 2025. Grievant testified that human resource manager suggested that Grievant be placed on a performance improvement plan and Grievant was asked to provide the Director with plans and goals for how Grievant would perform her duties going forward and information about other positions within the Program that may be of interest to Grievant.²¹

On November 7, 2024, Director decided to proceed with terminating Grievant’s employment and Grievant was issued another memorandum of “Final Disposition, Group III Termination (Group III Termination Memorandum).”²² The Group III Termination Memorandum cited the final disposition of termination as based on “disruptive behavior/disruption of the workplace and overall loss of confidence to perform as the Staff Training Coordinator.”²³

The Group III Termination Memorandum described Grievant’s misconduct as follows:

you made statements with the intent to impugn one’s reputation through gossip, retaliated against your supervisor, and demonstrated behavior that is rude, unprofessional and displayed a lack of regard for others. The communication you had with others during the workday significantly disrupted your work completion and my work completion for the remaining work week through October 18. My efforts have been ongoing to correct false perceptions made by you to other staff. In addition, recording and posting a video to social media during the workday of yourself stating that your coworkers are racist is unacceptable. Communication and behavior

²⁰ Agency Ex. at 2-3.

²¹ Hearing Recording at 1:52:43-1:56:19, 8:08:34-8:16:14.

²² Grievant Ex. at 10-11, Agency Ex. at 105-107.

²³ See Agency Ex. at 105-107, and see also the Final Disposition, Group III Termination memorandum signed by the Director on October 22, 2024, which described that misconduct for which Grievant was being terminated as “disruptive behavior/disruption of the workplace and overall loss of confidence to perform as Staff Training Coordinator.” Agency Ex. at 2-6.

that serves to challenge or resist managerial/supervisory authority, gas-lighting colleagues or leaders through gossip, insults, rudeness and criticisms are considered as a violation of the Civility in the Workplace Policy (39) and significantly impacting [Program's] services and operations (37) during the workday.

Most recently, on 10/18 you disregarded my request made on 10/17 to be on site at work and decided on your own to drive for another department without any communication or consideration for an alternative to miss work. On 10/19, you were absent without communication for a staff directed attendance at 1230 for [Program] Family Day.²⁴

The Group III Termination Memorandum stated that as part of its determination the Agency also considered that Grievant had received prior counseling related to leave requests and prior discipline and conversations related to unsatisfactory performance with respect to coordinating and managing training as follows:

We have spoken about the lack of communication regarding attendance and properly requesting leave on 9/24/24 (verbal counseling). On 9/27, you were issued a Group I Intent (re: training documentation) and ignored requests (9/30, 10/1, 10/9, 10/11, and 10/17) to meet in person through 10/4/24. We met on 10/7/24 to discuss Group I Intent issued by e-mail and also the Group 3 Intent. You have continually ignored requests to communicate which has demonstrated a lack of professionalism, respect for authority and dedication to the job.

Over the course of your employment, expectations of your role as [Staff Training Coordinator] have been addressed with significant needs for accurate records, procedures and communication to ensure state and national minimum requirements are met and impacted operations.²⁵

The Group III Termination Memorandum concluded that the decision to terminate was made as follows:

After meeting for another opportunity of due process on 11/6 and consideration of the discussion of what led to termination, my final decision remains for termination. I have lost all confidence that you will follow your supervisor's directions moving forward and that you can successfully meet the EWP core responsibilities as the Staff Training Coordinator because you have demonstrated discourteous and unprofessional behavior, misused time at work, not documented [Program] training properly, not met timelines for training new employees, and significantly ignored requests to communicate therefore, determined termination is warranted.²⁶

²⁴ Agency Ex. at 105-106 and Grievant's Ex. at 10-11.

²⁵ Agency Ex. at 105-106 and Grievant's Ex. at 10-11.

²⁶ Agency Ex. at 105-106 and Grievant's Ex. at 10-11.

The memorandum noted that Grievant's termination was effective November 9, 2024. Grievant signed the memorandum indicating her receipt of the document.

CONCLUSIONS OF POLICY

In this dismissal grievance the Grievant has challenged the discipline she received on November 7, 2024, that is, the "Final Disposition, Group III Termination" memorandum (Group III Termination Memorandum) dated November 7, 2024, and signed by Grievant and Director.²⁷ The burden of proof is on the Agency to show by a preponderance of the evidence that its issuance of the Group III Termination Memorandum was warranted and appropriate under the circumstances.

The responsibility of the Hearing Officer is to determine whether the Agency has proven by a preponderance of the evidence that the disciplinary action as set forth in the Group III Termination Memorandum was warranted and appropriate under the circumstances. To do this, the Hearing Officer reviews the evidence *de novo* (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the disciplinary action; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

Whether Grievant engaged in the behavior described in the Group III Termination Memorandum and whether the behavior constituted misconduct

The Agency proved by a preponderance of the evidence that Grievant engaged in the misconduct of failing to follow supervisory instructions related to Family Day and unsatisfactory performance related to driving a bus and working offsite. The Agency has not met its burden of proving by a preponderance of the evidence that Grievant engaged in behavior that violated DHRM Policy 2.35, Civility in the Workplace.

Allegations of Misconduct related to Family Day

The Agency proved by a preponderance of the evidence that Grievant engaged in the misconduct of failing to follow supervisory instructions when she arrived on campus an hour or more later than instructed for Family Day on October 19, 2024. Grievant previously had received a verbal counseling about the importance of timely communicating her leave requests to Director. There did not appear to be any dispute that Program staff were instructed to be on the Program campus by 12:30 pm for Family Day. There also did not appear to be any dispute that Grievant did not arrive for Family Day by 12:30 pm, did not request to take leave on Family Day that would allow her to be late on that date, and did not communicate with Director about her need to arrive late.

²⁷ Although the Agency's documents are unclear as to the relationship of the October G3 Memorandum and the Group III Termination Memorandum issued in November, this Hearing Officer considers the October G3 Memorandum to have been effectively amended and reissued as the Group III Termination Memorandum issued on November 7, 2024.

Grievant arrived at least an hour or more later than instructed. Grievant's failure to arrive at the Program campus by 12:30 pm on Family Day was a failure to follow both the instructions Program staff had been given to arrive by 12:30 pm and the instructions she received through the September verbal counseling to communicate timely with Director regarding her needs for leave.

Allegations of Misconduct related to driving the bus on October 18, 2024

The Agency also proved by a preponderance of the evidence that Grievant engaged in unsatisfactory performance when she did not communicate with Director that she would be working offsite to perform duties outside of her normal scope of work by driving Witness-9 and cadets to the Community College on October 18, 2024. This Hearing Officer was not persuaded by the Agency's argument that Grievant failed to follow supervisory instruction or engaged in insubordination when she drove Witness-9 and Program cadets to the Community College. The evidence showed that it was not uncommon for Grievant to perform work for the Program that was outside the scope of her duties as a Staff Training Coordinator. The evidence also showed that Director expressed concern to Witness-9 about Grievant's ability to perform her normal work duties and be away from the Facility campus during that time. The evidence did not show, however, that Director ever instructed Grievant that she was not to drive the bus on October 18, 2024. Director did not provide any instruction to Grievant either directly, or through Witness-9 related to driving the bus. Although not an act of insubordination or failure to follow instruction, Grievant's failure to communicate with Director regarding the fact that she was driving the bus and working offsite was unsatisfactory performance. It was reasonable for Director to expect that Grievant would communicate with her when Grievant would be working offsite, particularly when, as here, Grievant was performing work outside of the scope of her position as the Staff Training Coordinator and when doing so would require Grievant to be offsite and away from her normal duties for most of the workday. Even if, as Witness-9 and Grievant asserted,²⁸ Witness-9 had mentioned that Grievant may be driving the cadets to the Community College for their classes during a briefing that Director attended, Director had a reasonable expectation that Grievant would communicate directly with her about Grievant's plans and how they may impact the performance of Grievant's regular work duties. Significantly, in this instance, Grievant knew, based on her conversation with Witness-9, that Director believed that Grievant had new employee training to provide and would be performing her work duties on campus on that date. Grievant's failure to communicate with Director to clarify her plans for work on that date was unsatisfactory performance.

To the extent that the Agency argued that Grievant had "significantly ignored requests to communicate" in other contexts following the Agency's issuance of a verbal counseling with respect to communicating requests for leave, there was insufficient evidence presented for this Hearing Officer to make such a finding as there was no evidence as to the specific failures to communicate, aside from the issues related to leave that had been addressed through a prior verbal counseling. Director appeared, at times, to reference Grievant's decision not to provide written rebuttal during the Agency's

²⁸ Hearing Recording at 6:23:45-6:24:08, 6:29:38-6:31:33, 8:46:49-8:47:42.

internal due process for discipline as a failure to communicate, however, this Hearing Officer does not consider such a decision by an employee to be misconduct.

Allegations related to violation of DHRM Policy 2.35

The Agency has not met its burden of proving by a preponderance of the evidence that Grievant engaged in behavior that violated DHRM Policy 2.35, Civility in the Workplace for gossiping and displaying behavior that was rude, unprofessional, showed a lack of regard for others, and disrupted the workplace. To support the allegations of Grievant's misconduct, the Agency relied on the testimony of Director. Director testified that a Program employee or employees reported to Director that Grievant and other staff engaged in gossip about Director and made statements to "impugn [Director's] reputation."²⁹ Director also testified that when Director confronted Grievant with the allegations, Grievant identified Employee-A as having called Director a "racist." It appeared that Director then presented Employee-A with a notice of intent for discipline which Director told Employee-A was based on allegations made by Grievant and other employees that Employee-A had called Director a racist. Based on the evidence presented, after Employee-A was presented with a notice of potential discipline and told that she was receiving the discipline based on allegations made by Grievant, Employee-A told Director that it had not been Employee-A who called Director a racist, but it had been Grievant who had called Director a "racist" and a "bitch."³⁰

Grievant generally denied engaging in such behavior and specifically denied the allegations that she had called Director a racist or a bitch. Grievant also denied that she ever accused Employee-A of calling Director a racist. Grievant offered the testimony from other Program employees (Witness-4, Witness-6, Witness-8, and Witness-9) who generally testified that Grievant was not someone who engaged in gossip and that they had never observed Grievant refer to Director as a "racist" or a "bitch" or otherwise make derogatory comments about Director.³¹

The employee (or employees) who allegedly initially reported Grievant's misconduct to Director did not testify during the hearing. Although Director provided some testimony as to what Grievant was reported to have said, there was no testimony or as to when or how that employee(s) observed Grievant's conduct. There also was no written evidence or documentation from that employee(s) of their allegations or their observations of Grievant's statements or conduct. The Hearing Officer could not determine the credibility of the employee(s). There was no evidence presented as to why the employee(s) who reported Grievant's behavior to Director should be considered more credible than Grievant and Grievant's witnesses.

Employee-A also did not testify during the hearing. The Agency offered two different versions of an unsigned, typewritten statement from Employee-A that Director described as a rebuttal statement provided by Employee-A after Director issued the notice

²⁹ Hearing Recording at 1:56:13-2:01:30.

³⁰ Hearing Recording at 2:12:46-2:15:06.

³¹ Hearing Recording at 4:17:00-4:22:23, 4:33:48-4:35:34, 4:38:36-4:39:06, 6:04:14-6:07:13, 6:14:30-6:23:55, 6:27:04-6:28:30, 7:26:44-7:38:09, 8:22:51-8:26:33.

of intent for discipline to Employee-A.³² Witness-9 testified that Employee-A told Witness-9 that Employee-A made the accusations in her rebuttal statement out of anger toward the employees that Director had identified as accusing Employee-A of calling Director a “racist” and for which Director was threatening discipline against Employee-A.³³ Because Employee-A did not testify, the Hearing Officer was unable to determine the credibility of Employee-A. The credibility of the allegations attributed to Employee-A are questionable given Employee-A’s potential anger and motivation based on Director’s threat of disciplinary action and identification of Grievant as one of Employee-A’s accusers.

The Agency has not met its burden of proving by a preponderance of the evidence that Grievant violated DHRM Policy 2.35 by engaging in gossip or calling Director a “racist” or a “bitch.”

The Agency also has not met its burden of proving by a preponderance of the evidence that Grievant violated policy by posting a video. Grievant admitted that she posted a video about racism in the workplace to the TikTok social media application. Grievant testified that she did not identify specific individuals or her particular workplace in the video. Although Director issued the Group III Termination Memorandum disciplining Grievant, Director testified that she never actually viewed the video. Director relied on a report from a Program employee about the video and a translation of the contents of the video that Director testified had been provided by that same employee using a voice-to-text application.³⁴ That employee did not testify during the hearing and this Hearing Officer could not determine that employee’s credibility or the reliability of the voice-to-text translation. Director asserted that the video was filmed and posted while Grievant was working on the Facility campus during working hours. There was no evidence presented, however, to support those assertions. Although two witnesses testified that they had viewed the video at some point, they did not provide any details about the video other than that they did not recall the video referencing or identifying any specific Program employees as racists.³⁵ There was no evidence that Grievant was at work when she created or posted the video or that she created or posted the video using Agency equipment or resources. The Agency also offered no evidence to suggest that Grievant’s posting of the video using a personal social media account was an extension of the Agency workplace. The Agency has not met its burden of proving by a preponderance of the evidence that Grievant’s posting of a video to the TikTok social media application was a violation of policy.

Whether the Agency’s discipline was consistent with law and policy

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”³⁶ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant

³² Agency Ex. at 66, 70 and 112 and Hearing Recording at 2:12:46-2:15:06.

³³ Hearing Recording at 6:14:30-6:23:55.

³⁴ Hearing Recording at 2:02:25-2:04:52, 3:08:20-3:14:32.

³⁵ Hearing Recording at 3:58:35-3:59:30, 6:31:33-6:32:29, 6:34:32-6:36:49.

³⁶ DHRM Policy 1.60, Standards of Conduct.

termination.”³⁷ The Agency decided to combine multiple offenses into a single Group III disciplinary action.

Failure to follow instruction or policy is a Group II offense. Unsatisfactory performance is a Group I offense. The Agency has not presented evidence to show that when considered separately or collectively there are unique impacts of Grievant’s misconduct that would warrant the elevation of those offenses to a Group III level offense. The Agency also has not offered evidence of aggravating factors that would support a higher-level offense.

The Agency appeared to suggest that Grievant’s performance as a Staff Training Coordinator was unsatisfactory and required the elevation of Grievant’s misconduct to a Group III level offense. This Hearing Officer cannot agree. Although the Group III Termination Memorandum arguably broadly referenced performance, the Group III Termination Memorandum did not identify Grievant’s performance as a Staff Training Coordinator as the misconduct for which Grievant was receiving the disciplinary action at issue in this case. The Group III Termination Memorandum recited prior performance issues for which Grievant previously had received the verbal counseling in September and the Group I Memorandum in October. Prior discipline is appropriately considered to determine whether the accumulation of discipline (i.e., the accumulation of separate written notices) allowed for termination or suspension based on the number and level of the disciplinary actions. Such prior discipline, however, would not elevate the offense level of misconduct at issue in this Group III Termination Memorandum unless the Agency demonstrated that the prior discipline was sufficiently similar to the misconduct that was the basis for this discipline to show a pattern or repetition of misconduct following the issuance of the previously issued discipline. The Agency did not offer such proof in this case. Finally, even if the Hearing Officer had found that Grievant’s performance as the Staff Training Coordinator was properly before the Hearing Officer and that the Agency had met its burden of proving that Grievant’s performance was unsatisfactory, it would not change the outcome of this case because such misconduct would not rise above the level of a Group II offense.

The Agency’s discipline was not consistent with law or policy because the Agency has not met its burden of proving that Grievant’s misconduct was a Group III level offense. The discipline must be reduced to a Group II written notice because the Group II level offense of failure to follow supervisory instruction is the highest-level offense that the Agency has proved.

Grievant argued that the Agency’s discipline was retaliatory and discriminatory. Although this Hearing Officer found that the Agency did not meet its burden of proof with respect to all of the allegations set forth in the Group III Termination Memorandum, the Agency has shown that it had business reasons to discipline Grievant based on Grievant’s misconduct and the preponderance of the evidence did not show that those reasons were mere pretext for discrimination or retaliation. To the extent that Grievant appeared to suggest in her written grievance forms that the Agency engaged in, or allowed,

³⁷ DHRM Policy 1.60, Standards of Conduct.

discriminatory or harassing conduct, the preponderance of the evidence presented did not support such a finding.

Mitigation

Virginia 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....”³⁸ 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 action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Issue related to conduct during the Hearing

The hearing for this matter was held in a stand-alone building on the Program campus. The building was comprised of two large rooms separated by restrooms. Witnesses waiting to testify sat in one large room while the hearing was conducted in the other room. Director was called to testify early during the hearing day. Director was not released following her testimony, however, because the Agency’s counsel indicated he may recall her to testify as a rebuttal witness. The understanding of this Hearing Officer and both parties’ counsel at the time was that Director would exit the stand-alone building and return if called by Agency counsel. Later in the day while the hearing was on-going, it was reported to Grievant and her counsel that witnesses waiting to testify were concerned that Director and another individual had returned to the building. Director had again exited the building by the time the matter was brought to the attention of the Hearing Officer and the parties’ counsels. Director provided a statement the following day that she had returned to the parking area of the building to wait for the hearing to end and she and the other individual (her driver) had then entered the building to use the restrooms. It is not clear to this Hearing Officer why Director chose to return to the building (and the building’s parking area) rather than either waiting in her office elsewhere on campus or contacting Agency counsel to determine whether she could be released. Although Director’s decision to return to the building was unnecessary and odd, based on the information provided, I do not believe that such behavior hindered the hearing process in this case or requires a specific adverse inference.

³⁸ Va. Code § 2.2-3005.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with EDR's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a "Final Disposition, Group III Termination" memorandum dated November 7, 2024, is **reduced** to a Group II written notice with a 10-day suspension without pay. Because a Group II written notice does not support termination by accumulation of disciplinary action with the single prior Group I written notice under DHRM Policy 1.60, the Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if that position is filled, to an equivalent position. The Agency is directed to provide **back pay** less the 10-day suspension without pay and less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.³⁹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

³⁹ 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.