



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12219

Hearing Date: April 1, 2025

Decision Issued: May 22, 2025

PROCEDURAL HISTORY

On November 7, 2024, Grievant was issued a Group II written notice for failure to follow supervisory instructions.

On November 7, 2024, Grievant timely filed a grievance to challenge the Agency's action. During the grievance process, on December 18, 2024, the Agency mitigated the discipline to a **Group I Written Notice**. The outcome of the Third Resolution Step of the grievance process was not satisfactory to the Grievant and the matter advanced to hearing. On January 13, 2025, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On April 1, 2025, a hearing was held at an Agency training facility.

During the hearing, the Hearing Officer sustained Grievant's relevance objections to an unmarked timeline prepared by Agency counsel and Agency Exhibit 15, an undated document identified by the Agency as supervisory notes that described undated events involving Grievant. Grievant also objected to Agency Exhibits 12 and 21A on relevance grounds. The Hearing Officer noted Grievant's objections but admitted Agency Exhibits 12 and 21A into the record. The Agency's remaining exhibits were admitted into the record without objection. All of Grievant's exhibits were admitted into the record without objection.

APPEARANCES

Grievant
Grievant's Advocate

An Equal Opportunity Employer

Grievant's Advocate
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

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

BURDEN OF PROOF

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:

Grievant is an Office Services Specialist for a Division of the Department of State Police. A performance evaluation for the performance period ending in September 2024 showed that Grievant's performance was satisfactory to the Agency.¹ No evidence of prior active disciplinary action was introduced during the hearing.

At the time of the events at issue in this case, Grievant reported to First Sergeant who reported to Lieutenant-1. Lieutenant-1 reported to Captain.

Following a September 6, 2024, training about "Policy Reminders" that had been provided by the Agency's HR Manager and another human resources staff member, Grievant requested that HR Manager send a survey to staff in the Division to allow staff to provide feedback. Grievant testified that she and other Division staff had concerns about the delivery and some of the content of the presentation. Although Grievant

¹ Grievant Ex. 1 and 2.

described her request for a survey of Division staff to be a request for an opportunity for staff to provide an evaluation or feedback on the presentation, particularly the delivery of the presentation by HR Manager, Grievant also testified that she verbally requested that HR Manager treat her request as confidential.²

On September 9, 2024, HR Manager informed Lieutenant-1 of Grievant's request for a survey of Division staff.³

Lieutenant-1 advised Captain of Grievant's request to HR Manager for a survey of Division staff. Captain decided not to conduct the survey requested by Grievant. Captain instructed Lieutenant-1 to inform Grievant of Captain's decision and advise her of the Agency's process for submitting and addressing employee concerns.⁴

On September 17, 2024, at 9:54 am, Lieutenant-1 sent an email to HR Manager. Captain and Lieutenant-2 were copied on the email. The email advised HR Manager of Division management's decision regarding Grievant's request for a survey of Division staff:

[Captain], [Lieutenant-2], and I have discussed the request by our personnel to complete a survey. We do not believe the survey is needed and I am willing to discuss [Grievant's] concerns directly with her. We collectively believe that the best course of action is for the employees to first speak to their direct supervisor and allow supervision to address their concerns.

In the event the matter cannot be handled the employee could seek further guidance from HR. Please advise your thoughts so we can develop a course of action.⁵

HR Manager replied to Lieutenant-1's email later that same morning as follows:

This sounds like a great idea. [HR staff person] and I got a little behind in developing the survey, so this is perfect timing as we haven't even started on it yet. As we stated in our training it is essential that employees go through their chain of command to resolve any issues. HR is here to help if that is not successful. . .⁶

In response to an email from Grievant questioning the status of Grievant's requested survey, at approximately 2:31 pm on September 17, 2024, HR Manager advised Grievant that she was "working with [Division] management as to the best approach to take."⁷

² Hearing Recording at 6:43:11-6:48:03, 7:14:51-7:22:45.

³ Agency Ex. 7.

⁴ Hearing Recording at 1:18:34-1:19:16, 1:33:20-1:37:21, 4:17:50-4:20:40.

⁵ Agency Ex. 7.

⁶ Agency Ex. 7.

⁷ Agency Ex. 4.

Consistent with the instructions he received from Captain and his email to HR Manager, on September 18, 2024, Lieutenant-1 asked Grievant to meet with him in a conference room. Lieutenant-1 intended to advise Grievant that the Division had decided that it would not conduct the survey. Lieutenant-1 also intended to provide Grievant with guidance and instructions regarding the Agency's procedures for communicating and addressing employee concerns or complaints. Lieutenant-1 prepared a written memorandum of his instructions to provide to Grievant because his experience with Grievant was that she would ask to see things in writing.⁸

Lieutenant-1 also asked Lieutenant-2 to attend the meeting with Grievant.⁹

After Grievant entered the conference room, Lieutenant-1 asked Grievant to "have a seat." Grievant refused to sit and remained standing. Lieutenant-1 described being in a business setting and again asked Grievant to "have a seat." Grievant again refused to sit down. Lieutenant-1 did not suggest or reference Grievant having a seat again. Lieutenant-1 and Lieutenant-2 both sat down at the conference room table. Grievant remained standing behind a chair at the conference room table.¹⁰

Lieutenant-1 placed a copy of the memorandum he had prepared for Grievant on the table and slid the memorandum toward the area where Grievant was standing. Grievant did not pick up the memorandum at that time.¹¹

Lieutenant-1 advised Grievant that the survey of the Division staff that Grievant had requested from HR Manager was not going to occur and that he wanted to review the memorandum and the Agency's process for receiving and addressing complaints. Grievant responded that HR Manager had violated her rights because her request to HR Manager was confidential.¹²

As Lieutenant-1 tried to discuss the matter with Grievant, Grievant told Lieutenant-1 to stop interrupting her. Lieutenant-1 stopped trying to speak in order to allow Grievant to speak and to try to reduce the tension in the room.¹³

When he believed Grievant had finished speaking, Lieutenant-1 then attempted to review the memorandum with Grievant. Grievant stated she was leaving, picked up the memorandum, and started walking toward the conference room door as though to exit the conference room. Grievant had to walk behind where Lieutenant-1 was seated in order to exit the conference room.¹⁴

After Grievant stated she was leaving and before Grievant reached the conference room door, Lieutenant-1 advised Grievant that they had not concluded their conversation

⁸ Hearing Recording at 1:39:38-1:41:19, 1:58:01-1:59:00 and Agency Ex. 8.

⁹ Hearing Recording at 1:19:16-1:23:25, 2:27:08-2:27:48.

¹⁰ Hearing Recording at 1:23:25-1:24:31 and see 2:27:08-2:33:19 and 6:55:50-6:56:33.

¹¹ Hearing Recording at 2:30:00-2:31:52.

¹² Hearing Recording at 1:24:30-1:24:50 and see 6:49:07-6:53:17.

¹³ Hearing Recording at 1:24:50-1:25:21, 2:30:00-2:31:52.

¹⁴ Hearing Recording at 1:25:20-1:25:48, 2:28:00-2:29:32.

and that if she left the conference room, he would address the matter under the “standards of conduct.”¹⁵

When Lieutenant-1 advised Grievant that he would address her leaving the meeting under the standards of conduct, Grievant was approximately six to eight feet away from Lieutenant-1 and had not yet exited the conference room. At that time, Lieutenant-2 was approximately ten feet away from Lieutenant-1 and clearly heard Lieutenant-1’s statement to Grievant.¹⁶

Grievant did not respond to Lieutenant-1. Grievant continued to the conference room door and exited the conference room. Grievant then walked toward Captain’s office and found Captain just outside his office. Grievant asked Captain if she could speak with him in his office. Captain and Grievant entered Captain’s office.¹⁷

After Grievant left the conference room, Lieutenant-1 left the conference room to advise Captain of what had transpired between Lieutenant-1 and Grievant.¹⁸

When Lieutenant-1 arrived at Captain’s office, he could see Captain standing near his desk. Lieutenant-1 did not see Grievant inside Captain’s office and Lieutenant-1 entered Captain’s office.¹⁹

After Lieutenant-1 entered Captain’s office, Grievant immediately decided to leave Captain’s office. Grievant walked by Lieutenant-1 and exited Captain’s office. As she was leaving, Grievant said “I’m not going to be disrespected.”²⁰

Later that day, and with Captain’s approval, Lieutenant-1 reported Grievant’s conduct during the September 18, 2024, meeting to the Agency’s Internal Affairs Section for investigation.²¹

On or about September 23, 2024, Grievant submitted a grievance regarding Lieutenant-1’s conduct during the September 18, 2024, meeting.²² On or about September 23, 2024, Grievant also submitted a grievance regarding her concerns that HR Manager had shared information that Grievant considered confidential.²³

On November 7, 2024, Grievant was issued a Group II written notice for failure to follow supervisory instructions.²⁴

¹⁵ Hearing Recording at 1:25:46-1:26:05, 1:50:07-1:52:30, 2:00:30-2:01:00, 2:09:24-2:10:20, 2:29:20-2:29:40, 2:31:40-2:32:40, 2:48:20-2:49:48.

¹⁶ Hearing Recording at 1:25:46-1:26:05, 1:50:07-1:52:30, 2:00:30-2:01:00, 2:09:24-2:10:20, 2:29:20-2:29:40, 2:31:40-2:32:40, 2:48:20-2:49:48.

¹⁷ Hearing Recording at 6:58:50-7:00:35.

¹⁸ Hearing Recording at 1:26:05-1:27:19.

¹⁹ Hearing Recording at 1:26:05-1:27:19.

²⁰ Hearing Recording at 1:26:05-1:27:19, 2:32:29-2:33:19, 4:20:40-4:21:32, 4:35:00-4:36:44.

²¹ See Ex. 23 and Hearing Recording at 4:24:10-4:24:20.

²² Agency Ex. 10 and 10A.

²³ Agency Ex. 5 and 5A.

²⁴ Agency Ex. 2.

On November 7, 2024, Grievant timely filed a grievance to challenge the Agency's action.²⁵ On December 18, 2024, the Agency mitigated the discipline to a Group I Written Notice.²⁶

CONCLUSIONS OF POLICY

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

The preponderance of the evidence showed that Grievant engaged in misconduct when she abruptly left the meeting with Lieutenant-1 and Lieutenant-2 before the meeting had concluded and after Lieutenant-1 had advised her that if she left the meeting, he would address her conduct under the standards of conduct.

Grievant testified that during their meeting on September 18th, Lieutenant-1 was angry, aggressive, cutting her off and not letting her speak, "yelling at the top of his lungs," and "out of control." Grievant testified that she left the meeting because she felt disrespected and as though the meeting was not going to improve because of Lieutenant-1's conduct. Grievant asserted that as she was leaving, Lieutenant-1 asked her "where do you think you are going?" but that he did not instruct her to stay in the meeting or advise her that failure to do so would be addressed under the standards of conduct. According to Grievant, it was not that she may not have heard the instruction from Lieutenant-1, but that Lieutenant-1 made no such statement.²⁷

Grievant's testimony regarding the meeting on September 18, 2024, was contradicted by the testimony of both Lieutenant-1 and Lieutenant-2. This Hearing Officer found the testimony of Lieutenant-1 and Lieutenant-2 to be credible. The hearing testimony of Lieutenant-1 and Lieutenant-2 was credible and consistent with each other's testimony and with the statements they each provided during the Agency's internal investigation of the incident. Lieutenant-1 and Lieutenant-2 credibly testified that Lieutenant-1 was not angry, aggressive, or yelling during the meeting. They both testified that when Grievant told Lieutenant-1 to stop interrupting her, he stopped speaking to allow her to speak. Contrary to Grievant's assertions, they described Lieutenant-1 as sliding the memorandum toward Grievant, not "throwing" it or "forcibly pushing" it in an aggressive manner as Grievant asserted. Lieutenant-2 described that during the meeting, Grievant appeared "frustrated," was speaking in an elevated voice, and repeatedly talking over Lieutenant-1. Both Lieutenant-1 and Lieutenant-2 credibly testified that Lieutenant-1's statement to Grievant before she left the room was that they had not finished their conversation and that if she left, the matter would be addressed under the standards of conduct. They also both testified that Lieutenant-1 made the statement sufficiently loud and within close enough proximity to Grievant that Grievant would have heard it.²⁸

²⁵ Grievant's Ex. 10, 11, 12.

²⁶ Agency Ex. 2.

²⁷ Hearing Recording at 6:40:07-6:53:17, 6:54:57-6:55:52.

²⁸ See Hearing Recording at 1:23:25-1:26:05, 1:27:06-1:28:01, 1:50:07-1:52:30, 2:00:30-2:01:00, 2:09:24-2:10:20, 2:29:20-2:29:40 and see Agency Ex. 23.

Although Grievant may have been frustrated that HR Manager told Lieutenant-1 about Grievant's request for a survey and may even have felt some trepidation or concern when she realized she was being called into a meeting with Lieutenant-1 that included Lieutenant-2 and a written memorandum, that frustration and those concerns do not excuse Grievant's conduct.

Lieutenant-1 was in a supervisory role to Grievant. As a supervisor, Lieutenant-1's expectation that Grievant, a subordinate employee, would meet with him at his request and receive guidance or instruction from him until the meeting concluded was a reasonable one. Lieutenant-1's warning to Grievant that their meeting had not concluded and that if she left the meeting, he would address the matter under the standards of conduct would reasonably be understood to be an instruction to Grievant to stay in the meeting until its conclusion or face potential discipline. The preponderance of the evidence showed that Lieutenant-1 spoke sufficiently loudly that Grievant, who was approximately six to eight feet away from Lieutenant-1, would have heard his warning and instruction. Grievant left the meeting with Lieutenant-1, who was a supervisor to her, before the meeting's conclusion. Grievant also left that meeting following an instruction from Lieutenant-1 to stay. Grievant's behavior was unsatisfactory and a failure to follow supervisory instruction. The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct when she left the meeting with Lieutenant-1 and Lieutenant-2 prior to the meeting's conclusion and following a supervisory instruction to stay.

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." 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 termination."²⁹

Failure to follow supervisory instructions is a Group II offense. During the grievance process, the Agency mitigated Grievant's discipline to a Group I Written Notice.

The Agency's discipline was consistent with law and policy.

Retaliation

Grievant appeared, at times, to suggest that the Agency's discipline was retaliation. In order to succeed with a retaliation defense, Grievant must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.³⁰ If the Agency presents a nonretaliatory business reason for the adverse employment action,

²⁹See DHRM Policy 1.60, Standards of Conduct.

³⁰ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

then Grievant must present sufficient evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.³¹ Grievant engaged in protected activity when she filed grievances on or about September 23, 2024. Grievant experienced an adverse employment action when she received a Written Notice on November 7, 2024. It is clear, however, that the Agency had nonretaliatory business reasons for the disciplinary action taken against Grievant based on Grievant's misconduct. Because the Agency had non-retaliatory reasons for its disciplinary action and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met her burden to prove the Agency's disciplinary action was retaliation.

Mitigation

Grievant argued that the discipline should be further mitigated because the Agency applied discipline inconsistently. Grievant argued that evidence of other disciplinary actions by the Agency for "insubordination" were more egregious than Grievant's misconduct. Grievant pointed to a summary included in the Agency's exhibits purporting to set forth disciplinary actions for similar offenses from approximately 2007 to October 2024. The document showed that there is a wide variety of behavior that may fall under the broad descriptions of insubordination or failure to follow instruction.³² The facts of the specific cases identified in the document were limited and, based on this Hearing Officer's review of the document, the document did not show that there were similarly situated individuals who received less discipline than Grievant for a same or similar offense to Grievant's offense.

Grievant also specifically identified as inconsistent the Agency's treatment of Executive Secretary based on an interaction between Lieutenant-1 and Executive Secretary for which Executive Secretary did not receive formal discipline.

Based on the evidence presented, although no one was able to provide a specific date of the interaction between Lieutenant-1 and Executive Secretary, it was estimated to have occurred during early 2024. According to Lieutenant-1 and Executive Secretary, Executive Secretary engaged Lieutenant-1 in an impromptu conversation in his office about a work project. Executive Secretary recalled becoming frustrated because they continued to go back and forth during their discussion and Lieutenant-1 did not seem to understand what she was trying to communicate. Executive Secretary testified that she became irritated and abruptly left Lieutenant-1's office to return to her own office and compose herself. Lieutenant-1 testified that Executive Secretary became frustrated during their conversation and then quickly stepped out of his office and walked away. Lieutenant-1 testified that he raised his voice to try to get her to come back to his office after she had exited so that they could conclude their conversation. Lieutenant-1 did not tell her before she left that if she left, he would address the matter under the standards of conduct and he did not consider calling after her to come back or to not walk away to be an order for her to stay. Lieutenant-1 testified that after Executive Secretary exited his office, he also left his office and asked Former First Sergeant to walk with him to Executive Secretary's office. Lieutenant-1 and Executive Secretary both testified that when

³¹ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

³² Agency Ex. 18.

Lieutenant-1 and Former First Sergeant joined Executive Secretary in her office, the three of them were able to continue the conversation until its conclusion.³³

Lieutenant-1 appeared to distinguish the situation with Executive Secretary from that with Grievant because he did not consider the meeting with Executive Secretary to be a formal meeting, but an informal and impromptu conversation, and he did not advise Executive Secretary before she walked away that if she left, he would address the matter under the standards of conduct. Lieutenant-1 also appeared to distinguish the two situations because Executive Secretary was willing to re-engage in the discussion and they were able to conclude their conversation when he rejoined her in her office.³⁴ Captain testified that his recollection was that at the time of the incident involving Lieutenant-1 and Executive Secretary, Captain's concern had been that both Lieutenant-1 and Executive Secretary admitted to having raised their voices during their conversation and he counseled them both that raised voices were not appropriate in the workplace.³⁵

Executive Secretary's conduct is distinguishable from Grievant's. The interaction between Executive Secretary and Lieutenant-1 was impromptu and initiated by Executive Secretary to discuss a particular work project. Executive Secretary was engaged in their conversation but became frustrated after some time. Both Executive Secretary and Lieutenant-1 described Executive Secretary as leaving quickly and, although Lieutenant-1 testified that he called out to her after she had walked out of his office, he did not advise her before she left that if she left his office her behavior would be addressed under the standards of conduct and he did not otherwise give her what he considered to be an order to stay in his office. Although Executive Secretary testified to being irritated during their conversation, when Lieutenant-1 approached her to continue their discussion moments later, she again engaged with him, and they ultimately reached a resolution. Unlike the interaction with Executive Secretary, the evidence showed that Lieutenant-1 initiated the meeting with Grievant so that he could provide her with guidance and instructions. The evidence also showed that throughout the meeting with Lieutenant-1, Grievant was unwilling to engage in a discussion that would allow Lieutenant-1 to provide her with that guidance and instruction. Additionally, unlike the interaction with Executive Secretary, Lieutenant-1 advised Grievant that if she left their meeting, he would address the matter under the standards of conduct and Grievant ignored Lieutenant-1 and continued to leave the meeting. Finally, unlike Executive Secretary, rather than engaging in the discussion with Lieutenant-1 when he entered Captain's office, Grievant chose to leave Captain's office.

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...."³⁶ 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

³³ Hearing Recording at 4:51:50-4:55:18.

³⁴ Hearing Recording at 1:52:30-1:53:37, 1:56:55-1:58:01, 2:01:00-2:05:20, 2:08:15-2:08:54, 2:10:15-2:10:30, 8:29:10-8:43:44.

³⁵ Hearing Recording at 4:51:50-4:55:18.

³⁶ Va. Code § 2.2-3005.

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.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of Group I Written Notice 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.³⁷

³⁷ 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.

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer