COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 12195

Hearing Date: January 3, 2025
Decision Issued: January 6, 2025

PROCEDURAL HISTORY

On February 27, 2024, the Agency issued Grievant a Group II Written Notice of disciplinary action. The offenses were noted as failure to comply with applicable established written policy or procedures and unsatisfactory work performance, identified as offense date January 8, 2024. On April 8, 2024, the Written Notice was reduced to a Group I during the grievance step process.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action, seeking removal of the Group I offense. The matter advanced to hearing. On November 4, 2024, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for December 18 2024, the first available date available for the parties. For good cause shown, the hearing was rescheduled for January 3, 2025. On January 3, 2025, the hearing was held in-person at the Agency's facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant did not submit separate exhibits. The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Advocate for Agency
Witnesses

ISSUES

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

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states "*[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Under Operating Procedure 135.1, *Standards of Conduct*, Group I offenses include acts and behavior less severe in nature, have relatively minor impact on business operations, but require correction in the interest of maintaining a productive and well-managed work force. Inadequate or unsatisfactory job performance is a definitive example of a Group I offense. Agency Exh. 7, p. 43.

Operating Procedure 038.1, *Reporting Serious or Unusual Incidents*, requires incident reporting:

> Timely and accurate reporting of incidents that occur in the Virginia Department of Corrections (DOC) is essential for immediate response, investigation, and further action and support in the event of a critical incident involving any employee/contractor/volunteer, visitor, inmate, probationer/parolee, or DOC property.

The Offense

The Group I Written Notice, issued by the facility Warden on February 27, 2024, detailed the facts of the offense, and concluded:

> Violation of Operating Procedure 135.1 Standards of Conduct - Failure to follow a supervisor's instruction, perform assigned work, or otherwise comply with policy and Inadequate or Unsatisfactory Job Performance. Several circumstances warrant the issuance of the Group II notice. To include the following: It was discovered that on January 8, 2024, incomplete and incorrect information was sent by Operations Manager [Grievant] to an attorney as needed to represent the VADOC in court.

Operations Manager [Grievant] is also being cited for the following occurrences:

- No Documentation in the […..] ACA and PREA Folders - During a meeting held with [Grievant] on 02/01/24, [Grievant] suggested that there was more documentation in the folders prior to the file cabinet being moved, but also acknowledged that he had not added any documentation since he assumed the role of Operations Manager
- Failure [to] follow OP 038.1 - Incident Reporting - regarding an incident where a check was lost by a Postal Assistant.
- Failure to keep the Unit Head abreast of operations and changes in his area of control.
- Behavior unbecoming of a Corrections Professional through email and interactions with co-workers (Notice of Improvement/Substandard Performance issued 0l/08/2024

Operations Manager [Grievant]'s actions fall under a Second Group Offenses (Group II)

- These include acts and behaviors that are of a more serious or repetitive nature. This level is appropriate for offenses that seriously impact business operations and/or constitute a neglect of duty involving major consequences, insubordinate behaviors, and abuse of State resources, etc. An accumulation of two Group II offenses normally should warrant termination.
- *Group II* offenses include, but are not limited to:
  Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure.
  Inadequate or unsatisfactory job performance

Agency Exh. pp. 1-3. For circumstances considered, the Written Notice stated, "[Grievant] has been a state employee since November 25, 2004, and has held the position of Operations Manager since April 25, 2023. [Grievant]'s past performance Evaluation History was also taken into consideration."

At the start of the grievance hearing, the Agency withdrew and removed from the Written Notice the charge related to behavior unbecoming of a corrections professional, as it was already addressed by the referenced Notice of Improvement/Substandard Performance issued 0l/08/2024.[1]

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

The Agency employed the Grievant as operations manager, without other active formal disciplinary actions.

[1] Accordingly, exhibits related to this removed element are also removed from the Agency's exhibits, Exh. 6, pp. 18-22.

The Agency witnesses testified consistently and credibly about the charged conduct in the Written Notice. Testimony provided by Warden B and Warden M confirmed the facts alleged in the Written Notice regarding the error that led to a circuit court show cause hearing against the Agency. While the conduct was not intentional, it falls within the scope of unsatisfactory job performance. The Grievant was unable to refute this occurrence and emphasized that it was a mistake that should be weighed against his long job tenure otherwise without such errors.

Certification Analysist J credibly testified to her observations regarding the Grievant's lax recordkeeping regarding the facility's audits for American Correctional Association (ACA) and Prison Rape Elimination Act (PREA). The Grievant's Employee Work Profile (EWP) includes significant percentages of core responsibilities for audit management and maintaining the recordkeeping to satisfy periodic audits. Agency Exh. 5, pp. 13-17. Certification Analyst J testified that she and her team had to do significant extraordinary work to make up for the recordkeeping insufficiency in preparation for the ACA audit. The Grievant testified that these responsibilities, for at least part of the time covered, were shared by another operations manager, and the other manager was responsible for the recordkeeping lapses. While I find there was some awkward overlap with the other operations manager (and there was tension between the two), such situation does not absolve or excuse the Grievant's failure to meet his core job responsibilities.

Warden B testified to the incident of the lost check in the mailroom. The warden credibly testified that he directed the Grievant to file an incident report—a responsibility that the Grievant should have known to do and how to do it, pursuant to OP 038.1. Warden B summed up his opinion that the Grievant's skills and abilities were "not up to par." Warden B testified to the Grievant was not sufficiently keeping him abreast of operations and changes in his area of control. Warden B explained that this concern included the Grievant's oversight of inmate grievance and disciplinary appeals and the severe backlog of cases under his supervision—a specific part of the Grievant's core responsibilities outlined in his EWP. The Grievant testified that all of these circumstances were either out of his control or otherwise minimal offenses that should not have an effect on his character or career.

Warden B testified that mitigation was considered, recognizing the Grievant's long work record weighing in favor of mitigating a Group II offense down to a Group I Written Notice.

Analysis

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, including the Grievant's admissions that mostly confirm the instances cited in the Written Notice, I find that the Agency has proved the charged conduct, any one instance of which is sufficient to satisfy a Group I Written Notice for unsatisfactory job performance.

In general, agencies are entitled to expect good judgment and performance from its employees. Failure to meet these expectations may constitute unsatisfactory

performance, even in the absence of specific policy instruction. *See*, for example, EDR Ruling No. 2024-5710. I find that the instances of conduct charged in the Written Notice constitute unsatisfactory work performance and, therefore, collectively satisfy a Group I offense.

Contrary to the Grievant's approach to the grievance, the Agency has the prerogative to issue discipline for conduct that does not meet the Agency's standards of conduct. This judgment of work performance falls within the Agency's discretion. The Agency could have elected lesser discipline along the continuum of progressive discipline, but it is not required to exercise informal discipline in lieu of formal. The Agency previously elected informal discipline with the prior Notice of Improvement Needed, mentioned above. Accordingly, based on the definitional description of a Group I offense, I find the Agency has proved the conduct charged reasonably requires correction in the interest of maintaining a productive and well-managed work force. Accordingly, I find that the Group I discipline is consistent with policy.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." The Agency's Policy 135.1, *Standards of Conduct*, is consistent with DHRM policy. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty,

but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency's mitigation decision is fairly debatable. Because I am not a "super-personnel officer," even though I may have elected lesser discipline, I lack the authority to reduce the discipline under these circumstances. The Grievant has not shown any recognized mitigation factor, such as some improper motive. The mitigating factors offered by the Grievant—his long, dedicated tenure—do not rise to the level required to alter the Agency's election to exercise its discretionary discipline.

DECISION

For the reasons stated herein, the Agency's Group I Written Notice must be and is upheld, but with removal of the element of "[b]ehavior unbecoming of a Corrections Professional through email and interactions with co-workers (Notice of Improvement/ Substandard Performance issued 0l/08/2024)."

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.

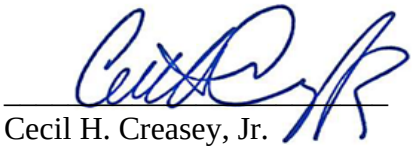
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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.[2]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

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