DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12202

Hearing Date: February 7, 2025
Decision Issued: February 11, 2025

## PROCEDURAL HISTORY

On August 21, 2024, Grievant was issued a Group I Written Notice.[1] On September 25, 2024, Grievant filed a grievance challenging the Agency's action.[2] The grievance was assigned to this Hearing Officer on November 18, 2024. A hearing was held on February 7, 2025.

## APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

## ISSUES

Did Grievant violate HRM-014.

## AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

[1] A. Ex. 1, at 160
[2] A. Ex. 1, at 7
[3] See Va. Code § 2.2-3004(B)

## 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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.[4] However, proof must go beyond conjecture.[5] In other words, there must be more than a possibility or a mere speculation.[6]

## FINDINGS OF FACT

After reviewing the evidence and observing the demeanor of each witness, considering their motive, potential bias, and corroborating or contradictory evidence, I make the following findings of fact. The Agency submitted a notebook containing pages 1 through 482. Without objection it was accepted as Agency Exhibit 1. Grievant submitted a notebook containing pages 1 through 357. Without objection, it was admitted as Grievant Exhibit 1.

At 11:02 AM, on February 10, after the record was closed at the conclusion of the hearing on February 7, Grievant sent me the following email:

*Please find attached the most recent version of the "SCHEV staff feedback for UVA M.Ed. Special Education modification" which was provided to my supervisor on July 26, 2024 and includes key points which were not included in the version shared by the University at the hearing on my grievance last Friday, February 7, 2025 which is a misrepresentation of material facts in considering the processing of the proposal prior to SCHEV's engagement with [AP] and excluding me. The attached proposal with notations from my meeting with [KP] on June 24, 2024 corroborates the notations in the "SCHEV staff feedback for UVA M.Ed. Special Education modification" and demonstrates a clear contradiction of the misrepresentation of what/when issues were raised, known by whom and addressed in the hearing. The date in which each document was created/edited - found in "file properties" - is consistent with the dates I reference above.*

Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is newly discovered evidence. Newly discovered evidence is evidence that was in existence at the time of the hearing but was not known or discovered by Grievant until after the hearing ended. However, the fact that Grievant discovered the evidence after the hearing does not necessarily make it in newly discovered. Rather the Grievant must show that:

- (1) the evidence is newly discovered, since the judgment was entered,
- (2) due diligence on the part of the Grievant to discover the new evidence has been exercised,
- (3) the evidence is not merely cumulative, or impeaching,
- (4) the evidence is material, and
- (5) the evidence is such that is likely to produce a new outcome if the case where retried, or such that would require the judgment to be amended.[7]

There is no evidence to suggest Grievant used due diligence to discover this evidence prior to the conclusion of the hearing. Further, based on my decision in this matter using the evidence presented in a

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[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

[5] Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

[7] (Second Administrative Review Ruling 2025-5750, August 20, 2024, at 2,3); Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), aff'd en banc, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); see EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure); See Boryan v. United States, 884 F.2d 767, 771-72 (4th Cir. 1989)

timely manner at the hearing, this proposed new evidence would be merely cumulative, not material, and would not produce a different outcome.

The following people testified at the hearing:
Associate Provost = AP
Deputy Provost = DP
Grievant

HRM - 014(1) **University Staff Employee Standards of Conduct** states in part: *Minimum expectations for acceptable workplace conduct and performance include but are not limited to:*

*•Work cooperatively to achieve school/department unit goals and objectives.*

*•Make work related decisions, and or take actions that are in the best interest of the University.*

*•Perform duties and responsibilities with the highest degree of public trust in a manner that supports the University's mission.*

*•Meet or exceed job performance expectations*.[8]

HRM - 014(4) **Disciplinary Actions** states in part: *When counseling has failed to correct … performance problems,…management shall address the matter by issuing a written notice,…* [9]

HRM 014-(4)(a) **Consideration for Group I Offenses** states in part: *Offenses in this category include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct, or for first acts that have a relatively minor impact on business operations but still require formal intervention. Examples may include… **unsatisfactory work performance***.[10] (emphasis added)

Grievant is a Senior Analyst for Academic and Distance Compliance. She provides essential coordination, analytical, and procedural services in support of institutional compliance activities… reviews institutional reports and related documents **for accuracy and quality**… She coordinates the internal approval process for new, revised, and discontinued, academic programs, and initiatives, and provides initial advice and procedural guidance regarding SCHEV…requirements.[11] (emphasis added)

The Written Notice at **Section II – Offense (1) Incorrect Identification of desired name for minor** contained an allegation of unsatisfactory performance. On March 18, 2024, Grievant was contacted regarding 2 course name changes to an existing concentration. One was to change New Media to Digital Art.[12] In as much as "New Media" has been the name since 2009, and as what was new then is no longer new, the faculty of the Art Department felt "Digital Media" was now a more accurate and lasting name for this concentration.[13]

[8] A. Ex. 1 at 374
[9] Id. at 376
[10] Id. at 376
[11] A. Ex. 1 at 333
[12] A. Ex. 1 at 176, 197
[13] A. Ex. 1 at 179

On April 4, in a **Proposal to Rename the New Media Concentration**: *The faculty of the Art Department propose[d] to change the New Media concentration to Digital Media.*[14] On April 12, in a similar **Proposal to Rename the New Media Concentration:** *The faculty of the Art Department propose[d] to change the New Media concentration to Digital Art.*[15]

On June 24, a number of emails were exchanged regarding this matter. Grievant wrote to the Dean of the Art Department, copying among others, AP, DP, the Librarian, and the Office of the University Registrar, indicating that the concentration name change had been approved for the Fall of 2024.[16] On June 24, Grievant was reminded that the desired name was "Digital Media" and not "Digital Art."[17]

DP wrote to Grievant and stated: *I found a document dated April 2024, with "Digital Media" and one dated May 2024 – and shared with [Academic Affairs Committee] – with "Digital Art". Did the April document come directly from the Art Dept? Is the May document a revised version of their proposal? It looks like the AAC did approve: "Digital Art" rather than "Digital Media", so it would be helpful to know where this went awry."*[18]

Grievant responded to DP: *So, the original document I received… dated March 18, 2024, and authorized by [ED], reflected "Digital Art". I also have a later version… dated April 12, 2024, which also reflected "Digital Art" as well as the AAC pdf, that contained a final sentence in the introduction: "if anything, dropping the word "media" should help the concentration further distinguish itself from fields of study in the Media Studies Department. Apologies, but I am not finding any documentation, other than an old email from within the Art Dept. in November 2023 that references "Digital Media" and don't recall there being an issue when reviewed with AAC – do you?*[19]

DP responded to Grievant: It sounds like they vacillated between these terms. *The first attachment I included in my email to you from earlier today did have "Digital Media". It is dated April 4, 2024, and includes this sentence: "The faculty of the Art Department propose to change the name of the New Media concentration to Digital Media." …*[20]

On June 25, *Grievant wrote to DP: After digging further, I have attached the email from [E] sent 3/18 which lines up with the write up in Word dated 3/18 indicating "Digital Art" for which they have not yet secured the Dean's approval. The next attachment is the more fully develop proposal in pdf, dated 4/9, following my guidance for additional information… which I advised I would add to the proposal to rename the New Media concentration to "Digital Media" … I believe I may have added their content to the Word version since the next document I have on file is the Word proposal dated 4/12, which reflects "Digital Art" but there is no record of any communications. Perhaps, when combining the material from the pdf with the original Word doc, **I mistakenly kept the original "Digital Art**" which then remained throughout the approval process…What else can I do to help make this right?*[21] (emphasis added)

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[14] A. Ex. 1 at
[15] A. Ex. 1 at 182
[16] A. Ex. 1 at 172
[17] Id. at 172
[18] Id. at 171
[19] A. Ex. At 170-171
[20] A. Ex. 1 at 170
[21] A. Ex. 1 at 169

This mistake, "Digital Art" instead of "Digital Media" continued through several more emails and reviewing bodies.[22]

Grievant responded to the Written Notice at **Section II – Offense (1) Incorrect Identification of desired name for minor**: •4/9/24 – ART submitted a final pdf proposal for dean approval. The proposed new minor provided by ART was identified as "Digital Media", however, [Grievant's] subsequent material preparation continued to use the term "Digital Art" by appending the following: ***Yes, this was my error*** *as I copied new information from the department into the original document and missed where the original name remained.*[23] (emphasis added)

AP testifies that Grievant's work product was lacking in accuracy, clarity and there was a lack of attention to detail. She further testified that this had been an ongoing issue for some time.

In her testimony, Grievant confirmed that this was her mistake. Based on her appended comments to the Written Notice, her admission in her testimony, and the other voluminous evidence presented regarding this allegation, I find that Grievant's performance was not satisfactory.

The Written Notice at **Section II – Offense (2)** ***Inability to prepare documentation requirement for a modality change (add online) to an existing degree program*** contained a second allegation of unsatisfactory performance.[24] The crux of this allegation is there was a desire to offer a course online in addition to its current face to face modality. On March 9, *the School of Education proposed to modify the Master in Special Education to add 100% online delivery*.[25]

On March 14, the *[Academic Affaires Committee] AAF unanimously approved the [State Council for Higher Education for Virginia] SCHEV required change in modality delivery for the MEd in Special Education.*[26]

Subsequently issues arose as to this application and changes SCHEV requested. On May 21, Grievant was removed from any further input.[27] AP testified that at this point she took on the task of moving this requested modality forward. Grievant testified that she had been in contact with one person at SCHEV and AP was apparently dealing with another. The testimony of AP and Grievant would suggest that both were receiving different inputs from SCHEV. Both AP and Grievant testified that dealing with SCHEV was often problematic. Some of the concerns expressed by SCHEV appear to be factual errors and more seem to be subjective language changes in drafting. It is unclear to me why the Grievant was removed from this process, apparently on the suggestion of SCHEV. It is unclear as to what the SCHEV liaison was telling Grievant regarding what should be in a first proposal and how suggested changes from SCHEV would be communicated to Grievant for correction. It is unclear as to why a second liaison from SCHEV communicated only with AP and suggested Grievant not be involved. Accordingly, I find the Agency has not met its burden of proof regarding this second allegation.

[22] A. Ex. 1 at 203, 204, 227
[23] A. Ex. 1 at 16
[24] A. Ex. 1 at 161
[25] A. Ex. 1 at 248
[26] A. Ex. 1 at 247
[27] A. Ex 1 at 270

There was much testimony regarding a Performance Improvement Plan that ended on or before August 4, 2022.[28] There was also much testimony regarding Academic Year End Reviews where AP rated Grievant as "Inconsistent" and Grievant self-evaluated as "Highly Effective."[29] Only the Group I Written Notice was qualified for Hearing.[30] AP testified that she had counseled Grievant numerous times as to her work product. Grievant acknowledged such but argued that such counseling was non-specific, not concrete, and generally unhelpful. Much of this hearing was consumed by the obvious differences of opinions between AP and Grievant and their difficulty in not only working together but communicating to one another. As I have found that Grievant's work performance was unsatisfactory regarding the first allegation of the Written Notice, I will not go into any further depth regarding the roughly 3 hours of testimony and several hundred pages of evidence dedicated to the second allegation.

## MITIGATION

*Va. Code § 2.2-3005(C)(6),* authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

## DECISION

I find that the Agency has borne its burden of proof in this matter and the issuance of the Group I Written Notice was proper.

## APPEAL RIGHTS

[28] A. Ex. 1 at 351
[29] A. Ex. 1 at 362
[30] A. Ex. 1 at 6

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 that 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 where 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].

William S. Davidson
William S. Davidson, Hearing Officer

Date: February 11, 2025

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