

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case Nos: 12218

Hearing Date: February 25, 2025
Decision Issued: February 26, 2025

PROCEDURAL HISTORY

On November 22, 2024, Grievant was issued a Group I and a Group II Written Notice.¹ On November 26, 2024, Grievant filed a grievance challenging the Agency's action.² The grievance was assigned to this Hearing Officer on January 2, 2025. A hearing was held on February 25, 2025.

APPEARANCES

Agency Advocate
Agency Representative
Grievant
Witnesses

ISSUES

Did Grievant violate DHRM Policies 1.60 1.25 and 2.35.

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.

BURDEN OF PROOF

¹ A. Ex. 1, at 47,51

² A. Ex. 1, at 78

³ See Va. Code § 2.2-3004(B)

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 78. Without objection it was accepted as Agency Exhibit 1. Grievant did not offer any documentary evidence.

The following people testified at the hearing:

WIC Coordinator = ■■■

Grievant

DHRM Policy 1.60, Standards of Conduct – Conduct Expectations of Employees states in part: The following list is not all-inclusive but is intended to illustrate the minimum expectations for acceptable workplace conduct and performance:

- Report to work as scheduled. Seek approval from the supervisor in advance of scheduled work shift for any changes, including the use of leave and late or early arrivals and departures.
- Perform assigned duties and responsibilities with the highest degree of public trust.
- Demonstrate respect for the agency and behave in a civil and professional manner toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.
- Resolve work-related issues and disputes in a professional manner and through established agency processes.
- Meet or exceed established job performance expectations.
- Make work-related decisions and/or take actions that are in the best interest of the agency.
- Comply with the letter and spirit of all state and agency policies and procedures, and Commonwealth laws and regulation.
- Work cooperatively to achieve work unit and agency goals and objectives.
- Always conduct themselves in a manner that supports the mission of their agency and the performance of their duties whether on duty or off duty.⁷

DHRM Policy 1.60, GLOSSARY OF OFFENSES states in part:

- **Absent without Supervisor's Authorization:** State employees are expected to report to work as scheduled and seek approval from their supervisors prior to initiating any

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 A. Ex. 1 at 5,6

changes to their established work schedule, including the use of leave and late or early arrivals and departures...

• **Disruptive Behavior:** Characterized by behaviors that interrupts or interferes with the normal flow and function of work, business operations and communications. Verbally or written disruptive behaviors may include (but are not limited to) abusive communications that serve to challenge or resist managerial/supervisory authority.⁸

DHRM Policy 1.25(C) EMPLOYEE RESPONSIBILITIES states in part:

1. Adhere to their assigned work schedules...

3. Notify management as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures...

DHRM Policy 2.35 Civility in the Workplace - POLICY SUMMARY states in part:

This policy is to ensure that agencies provide a welcoming, safe, and civil workplace for their employees, customers, clients, contract workers, volunteers, and other third parties and to increase awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment.

POLICY GUIDE - CIVILITY IN THE WORKPLACE Policy 2.35 Prohibited Conduct/Behaviors states in part that the following are prohibited:

- Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable.
- Demonstrating behavior that is rude, inappropriate, discourteous, unprofessional, unethical, or dishonest.⁹

Grievant worked at the Virginia Department of Health. ■ was her supervisor. Agency Exhibit 1 contained a Verbal Discipline notice dated July 18, 2016.¹⁰ I find that such a notice, given more than 8 years prior to the matter before me, to be neither timely nor relevant.

On January 28, 2014, Grievant was issued a warning from a former supervisor regarding late arrival at work and failure to notify that supervisor.¹¹ As this notice is more than a decade old, as above, I find it not relevant other than to refute any allegation that ■ was discriminating against Grievant. A former supervisor was also experiencing issues with Grievant.

On December 20, 2021, Grievant received a Group II Written Notice. This group notice was still active when the Group II and Group I Notices before me were issued.

On August 26, 2024, Grievant was placed on a Performance Improvement Plan (PIP) which was in effect until October 24, 2024. In part, the PIP stated:

- You are expected to report to work as scheduled and adhere to your assigned work schedule and notify management as soon as possible for any early departure or late arrivals.
- You are expected to adhere to the chain of command and follow all directives and instructions from your supervisor and management

⁸ A. Ex. At 26,27

⁹ DHRM Policy 2.35 at 3; Policy Guide at 1

¹⁰ A. Ex. 1 at 31-33

¹¹ A. Ex. 1 at 34

- Please be advised that any further violations of complying with all policies and procedures and failing to demonstrate improvement in your performance deficiencies may result in formal disciplinary action against you pursuant to DHRM Standards of Conduct 1.60.¹²

Grievant was issued a Group II Written Notice on November 22, 2024, for offenses that occurred on September 5, 13, and 30, 2024.¹³ On October 1, 2024, ■ wrote a summary report of Grievant's actions on these 3 dates.¹⁴ Her testimony before me was a verbal recitation of what she wrote.

Because of a shortage of staff, on September 5, ■, on short notice, closed one location (PG) and called Grievant to tell her to report to another (PHD). The call was made at 7:21 AM and Grievant acknowledged the change in her reporting location.¹⁵ Grievant should have reported to work at 8:15 AM, but did not arrive until 8:37 AM stating that there was traffic.¹⁶

Subsequently, ■ learned that there would be additional help, and she initiated calls to potential clients from PG to come to PHD. This plan would require 2 labs. The additional temporary lab was created using Examining Room A-2, an office space that Grievant often uses, but that is not a dedicated space for her.¹⁷

■ directed Grievant to work out of the main lab. Grievant asked why she could not work out of A-2. ■ was working with participants and did not have time to discuss alternatives, but did offer grievant the option of using the main lab and an office space separate from the main lab. At 8:45 AM, ■ brought a participant to the main lab to work with Grievant. Grievant stated that she was unable to log in to either of 2 computers ■ had offered for her to use and that she would use A-2.¹⁸

■ told Grievant that this was not an option and Grievant continued to argue with ■ in the presence of participants. ■ offered to move Grievant's laptop from A-2 to the main lab but was told by Grievant not to do this as she would come back to A-2 to work on her computer. The argument from Grievant continued.¹⁹

Grievant was using 2 spaces to complete her work and this was impeding workflow. Further, Grievant was performing tasks that she had not been asked to perform, rather than the lab duties she had been directed to complete. This slowed all work done that morning.²⁰

On September 13, 2024, Grievant completed paperwork for a participant and was inaccurate in some of the entries and she performed some of the data gathering in a public space. ■ called the participant who confirmed that the appointment was completed in the main waiting area. Grievant listed this participant as "non-breastfeeding" when in fact she had been pumping and formula feeding at the time of her appointment. ■ had to update the participant's status to provide for breastfeeding support and updated her food package.²¹

¹² A. Ex. 1 at 43,44

¹³ A. Ex. 1 at 47

¹⁴ A. Ex. 1 at 54-62

¹⁵ Id. at 54

¹⁶ Id. at 55

¹⁷ Id. at 54

¹⁸ Id. at 55

¹⁹ Id. at 56

²⁰ Id. at 56,57

²¹ A. Ex. 1 at 57,58

■ discussed this matter with Grievant who stated: “*I was trying to get them out as quickly as I could...I understood what I was doing was wrong and sometimes you just need a tap on the shoulder to remind you...*”²²

On September 18, 2024, Grievant was to report to work at 8:45 AM. Grievant told ■ that she was late due leaving her car at a dealership that morning. She had not told ■ that she would be leaving her car at a dealership, even though this was known and was planned in advance. At 9:36 AM, Grievant had not contacted the 9:00 or 9:30 AM appointments.²³ Grievant was issued a Group 1 Written Notice for failing to report to work as scheduled.²⁴

On October 11, 2024, Grievant was provided a Due Process Memorandum.²⁵ Grievant responded on October 14, 2024, with the following phrases: “*...I was running late (I thought I told you during the phone contact) ... I informed you that these computers are working slow and I preferred my own working space...I did not mean to cause any problems in the clinic flow...once again these situations are not intentional...if anyone are upset with my work once again I apologizes*”²⁶ Grievant’s testimony was similar to this written response. She did not deny being late in reporting to work, she did not deny failing to follow ■’s instructions regarding use of the main lab and she did not deny arguing with ■ while in the presence of participants. Finally, she did not deny failing to properly and accurately document information regarding participants.

Accordingly, I find the Grievant did violate DHRM Policies 1.60, 2.35 and 1.25. Absent mitigating circumstances, termination may occur for the accumulation of 2 active Group II level offenses. Because Grievant had an active Group II when the matter before me occurred, my finding in this matter means she now has 2 active Group II offenses and termination is a valid option for the Agency. In addition, I find that the evidence before me supports the issuance of the Group I Written Notice.

In her testimony, Grievant alleged both age and race discrimination as the reasons for these Group Notices. **DHRM Policy 2.05, Equal Employment Opportunity**, requires that “all aspects of human resource management be conducted without regard to **race**, sex, color, national origin, religion, sexual orientation, gender identity, **age**, veteran status, political affiliation, genetics, or disability.” For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination. However, if the Agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the Agency’s proffered justification was a pretext for discrimination.²⁷

While the Grievant has suffered an adverse employment action, she presented no facts as to race discrimination other than an assertion that she was not picked to attend unnamed conferences. She offered no concrete examples where a person of another race was specifically favored over her. She offered no evidence regarding age discrimination other than she is an older employee and finding employment at her age is difficult. The Agency has presented clear legitimate nondiscriminatory business reasons for its action in terminating Grievant’s employment.

²² A. Ex. 1 at 59

²³ A. Ex. 1 at 60

²⁴ A. Ex. 1 at 51

²⁵ A. Ex. 1 at 65-70

²⁶ A. Ex. 1 at 71,76

²⁷ Qualification Ruling 2021-5249, 2021-5255, 2021-5256, June 29, 2021, at 6,7); Strothers v. City of Laurel, 895 F.3d 317, 327-28 (4th Cir. 2018); EDR Ruling No. 2017-4549

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 and II Written Notices with termination was proper.

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 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 26, 2025

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