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 Nos. 12222, 12232

Hearing Date: February 25, 2025
Decision Issued: March 5, 2025

PROCEDURAL HISTORY

The Agency issued Grievant three Group II Written Notice of disciplinary action, with job termination. Two of the Group II Written Notices were issued on December 2, 2024, each with suspension. The third Group II Written Notice was issued on December 20, 2024, with job termination by accumulation of discipline.

The Grievant timely filed a grievance to challenge the Agency's disciplinary actions. The Grievant challenged all written notices and termination:

1) a grievance dated December 4, 2024, challenging two Group II Written Notices with suspension issued on December 2, 2024; and

2) a dismissal grievance dated December 30, 2024, challenging a Group II Written Notice with termination by accumulation of discipline.

Both grievances were consolidated for hearing, EDR Ruling No. 2025-5821, January 28, 2025.

The Grievant is seeking reversal of the Group II Written Notices, reinstatement, back pay and benefits. The matter advanced to hearing. On January 30, 2025, the Office of Employment Dispute Resolution assigned this consolidated grievance to the Hearing Officer. The hearing was scheduled for February 25, 2025, the first available date available for the parties. On February 25, 2024, the hearing was held via remote online video, as agreed.

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 also submitted exhibits and will be referred to as Grievant's Exhibits. The record was left open until February 26, 2025, noon, for receipt of the parties written closing briefs. The parties' written closing arguments were

received and made a part of the grievance hearing record. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Advocate for Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Policy 1.60, *Standards of Conduct*, Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that seriously impact business operations and/or constitute neglect of duty involving major consequences, insubordinate behaviors and abuse of state resources, violations of policies, procedures, or laws. Agency Exh. p. 127. Failure to follow supervisor's instructions or comply with written policy are specifically delineated as Group II offenses.

The Offenses

The three Written Notices set forth here in this consolidated grievance will be referred to as **A**, **B** and **C**.

A.

The Group II Written Notice, issued by the Assistant Superintendent on December 2, 2024, detailed the facts of the offense, and concluded:

Group II Written Notice Offenses/Violations:
DHRM Policies

- 1.60 – Standards of Conduct
- 2.35 – Civility in the Workplace

DJJ Policies/Administrative Procedures

- SOP 218 – Use of Force
    a. 2.18-4.0 General Procedures
    b. 2.18-4.1 Intervention Continuum
- VOL 1-1.2-01 Staff Code of Conduct
- VOL 1-1.02-08 Code of Ethics

- On August 10, 2024, you were observed instructing a subordinate Juvenile Correctional Specialist (JCS) to open the cell door of a noncompliant resident, who was displaying contraband.
    - The resident was not an immediate threat to himself or others and had a history of combative behavior making the need for physical force likely. You did not seek or receive approval before initiating this anticipated or preplanned use physical force.
    - When the resident attempted to exit his cell, you were observed pulling away from and shoving a lower-ranking Security staff member, who was attempting to prevent you from getting involved and engaging in the physical restraint of the resident.
    - You were the highest-ranking staff in the unit during this incident.

SOP 218 also states, *Under normal circumstances, the highest-ranking officer on duty shall not be involved in the use of physical force. He/she shall be in the immediate area to assess the situation, direct and observe staff, and remain objective.*

The disciplinary action was suspension from December 2 through December 6, 2024 (five workdays). For mitigating factors, the Written Notice stated, "Your Notice of Intent response and years of service with DJJ were carefully taken into consideration." For aggravating factors, the Written Notice stated:

- Expectations for Supervisors and Managers under DHRM Policy 1.60, Standards of Conduct. As a supervisor, you failed to perform your assigned duties and responsibilities with the highest degree of public trust, demonstrate respect for residential clients, comply with the letter and spirit of DJJ policies and procedures, and serve as a role model to your subordinates.
- Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable. Your inappropriate conduct equates to assaultive behavior, which endangered the physical safety of persons under your direct supervision.

Issuance of the Group II Written Notice with suspension is warranted.

Agency's Exh. pp. 9-10.

B.

The Group II Written Notice, issued by the Assistant Superintendent on December 2, 2024, detailed the facts of the offense, and concluded:

> Group II Written Notice Offenses/Violations:
> <u>DHRM Policies</u>
> - 1.60 – Standards of Conduct
>   a. Failure to Follow and/or comply with supervisory directives, written policy and/or agency procedures
>
> DJJ Policies/Administrative Procedures
> - SOP 218 – Use of Force
>   a. 2.18-4.0 General Procedures
>   b. 2.18-4.1 Intervention Continuum
> - VOL 1-1.2-01 Staff Code of Conduct
> - VOL 1-1.02-08 Code of Ethics
>
> - On August 10, 2024, you were observed instructing a subordinate Juvenile Correctional Specialist (JCS) to open the cell door of a noncompliant resident, who was displaying contraband.
>   a. The resident was not an immediate threat to themselves or others and had a history of combative behavior making the need for physical force likely
>   b. You did not seek or receive approval before initiating this anticipated or preplanned use physical force.
>   c. When the resident attempted to exit their cell, you were observed pulling away from and shoving a female lower-ranking Security series employee; who was attempting to prevent you from engaging with the resident and becoming involved in the physical restraint.
>   d. You were the highest-ranking staff in the unit during this incident. Your inappropriate conduct endangered the physical safety of others under your supervision and DJJ's care.
>
> SOP 218 states that physical force is authorized for *self-defense, the defense of others, to prevent an escape, to prevent property damage that may result in injury, to protect a resident from harming himself or herself, and to prevent the commission of a crime. Under any other circumstances, the Superintendent or designee must grant approval before using physical force.*

SOP 218 also states, *Under normal circumstances, the highest-ranking officer on duty shall not be involved in the use of physical force. He/she shall be in the immediate area to assess the situation, direct and observe staff, and remain objective.*

The disciplinary action was suspension from December 9 through December 20, 2024 (ten workdays). For mitigating factors, the Written Notice stated, "Your Notice of Intent response and years of service with DJJ were carefully taken into consideration." For aggravating factors, the Written Notice stated:

- Expectations for Supervisors and Managers under DHRM Policy 1.60, Standards of Conduct. As a supervisor, you failed to perform your assigned duties and responsibilities with the highest degree of public trust, demonstrate respect for residential clients, comply with the letter and spirit of DJJ policies and procedures, and serve as a role model to your subordinates.

Issuance of the Group II Written Notice with suspension is warranted.

Agency's Exh. pp. 6-7.

C.

The Group II Written Notice, issued by the Deputy Director on December 20, 2024, detailed the facts of the offense, and concluded:

Group II Written Notice Offenses/Violations:
<u>DHRM Policies</u>

- 1.60 – Standards of Conduct
- 2.35 – Civility in the Workplace

<u>DJJ Policies/Administrative Procedures</u>

- VOL 1 IV-4.1-1.01, Incident Reports
  - 1.01-4.1 Initial Notice and Review of Incident
  - VOL1 IV-4.1.01-4.3 Review of Incident Reports
- VOL I-1.2-01 Staff Code of Conduct
- DJJ Administrative Directive A-2024-001Chain of Command

- On July 18, 2024, at 6:43p.m., Security Manager (SM) [Grievant] processed an incident of staff unauthorized use of force as a regular sergeants investigation.

- This type of incident required the completion of a Serious Incident Report (SIR) as outlined in SOP VOL IV-4.1-1.01 (Incident Reporting).

- On July 26, 2024, at 4:30p.m., [Grievant] was notified by […], Director of Compliance that he was drafted until properly relieved.
  - [Grievant] responded to Director [of Compliance] stating, "I'm not staying, I have to go get my kids." Director [of Compliance] informed [Grievant] that he was given the directive by Director [of Security], in which he responded stating "I always stay, but tonight I can't stay." Director [of Compliance] instructed [Grievant] to follow up with Director [of Security], and he stated, "I will."
  - At 4:45p.m. [Grievant] called Director [of Security] and stated, "I'm not staying, I have to get my kids, I always stay." [Grievant] then stated, "and you sent your little minion round here to tell me." Director [of Security] addressed [Grievant] about his unprofessional behavior in referring to Director [of Compliance] as a "minion," reiterated that he was drafted, and disengaged from the phone call.

- While discussing the aforementioned draft concern in an email on July 29, 2024, at 6:15p.m., [Grievant] addressed Assistant Superintendent […] in an unprofessional manner by stating, "Lastly, you saying you would call me back on Friday and I'm just hearing from you says a lot. My issue was on Friday, today is Monday so what clarity or help did you provide?"
  - Director [of Security] and Superintendent […] were included on this email communication.

- On July 28, 2024, at 9:23a.m., [Grievant] initiated an email addressed to Director [of Security] and Assistant Superintendent […], raising concerns on what he believed to be JCS […]'s "unacceptable" no-call/no-show status.
  - [Grievant] inappropriately included two subordinates ([… and …]) on this email.
  - In response to Director [of Security] explaining that JCS […] was not a no-call/no-show, under doctor's care and follow-up will be made with Human Resources, [Grievant] engaged in unprofessional and disrespectful communication. Specifically, "This d[o]nt make any sense ……. How is this ok? .... Would you accept this from your subordinates?"

- On August 1, 2024, at 11:28p.m., [Grievant] sent Director [of Security] a unprofessional and discourteous text message following the end of your shift.

- You stated in part, “it’s not cool that you overloaded our plate today with all that paperwork…”

- On or about October 4, 2024, Watch Commander (WC) […] reported to Human Resources’ Employee Relations staff, that during a conversation between WC […] and [Grievant] (during the first week [of] WC […]’s employment with DJJ), [Grievant] stated that he is not in agreement with the therapeutic approach when de-escalating residents. [Grievant] reportedly said, “I come from […], we whoop kids’ ass!”

The disciplinary action was termination as of December 20, 2024. For mitigating factors, the Written Notice stated, “Your Notice of Intent rebuttal and years of service with DJJ were carefully taken into consideration.” For aggravating factors, the Written Notice stated:

- Expectations for Supervisors and Managers under DHRM Policy 1.60, Standards of Conduct. As a supervisor, you failed to perform your assigned duties and responsibilities with the highest degree of public trust, demonstrate respect for coworkers, supervisors, managers and subordinates, comply with the letter and spirit of DJJ policies and procedures, and serve as a role model to your subordinates.
- Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity are not acceptable.
- You currently have two Group II Written Notices for similar violations of the same policies outlined herein.

Issuance of this Group II Written Notice with termination is warranted.

Agency’s Exh. pp. 71-72.

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.

In general, agencies are entitled to expect good judgment 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. After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

With the exception of Written Notice A, I find that the instances of conduct charged in Written Notices B and C constitute failure to follow established policy and, therefore, each satisfies a Group II offense.

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

Written Notices A and B

The Agency witnesses testified consistently and credibly about the charged conduct in the Written Notices A and B. These Group II Written Notices arise from the same incident on August 10, 2024. The two written notices are confusingly duplicative of content. The written

notice designated herein as "A" pertains to the Grievant's uncivil conduct toward his subordinate employee when the subordinate employee tried to remind the Grievant to act properly in his capacity as the highest-ranking staff member. The written notice designated herein as "B" pertains to the Grievant's failure to comply with applicable policy for use of force. *See* Agency's written closing argument.

The Agency presented security video of the incident that shows and corroborates the Grievant's activity and conduct of engaging in the use of force as the highest-ranking staff member, contrary to established policy as detailed in the written notices. The interim superintendent and superintendent testified to the applicable policies and expectations of the Grievant's position as the highest-ranking staff member present at the August 10, 2024, use of force for restraint of the resident. The superintendent specifically testified to her training of staff, including the Grievant, that reinforced SOP 2.18, setting forth the parameters and procedure for use of force as well as the role of the highest-ranking staff member present.

The video of the incident clearly shows that the housing unit coordinator physically indicated to the Grievant, by holding him, not to engage in the restraint of the resident, as she and others present were lower-ranking staff members. The housing unit coordinator testified, on the Grievant's behalf, to her actions and intent to remind the Grievant that, as the highest-ranking staff member, he should step back and only observe and supervise. The housing unit coordinator testified, however, that the Grievant did not pull or shove her during the encounter. The Grievant simply disregarded her efforts and side-stepped her to enter the resident's room to engage in the restraint of the resident.

The Grievant testified that his conduct of engaging in the use of force was appropriate for the circumstances, and that he and others have done that before without consequence. The Grievant testified that this incident was not a planned use of force. Rather, he was responding to what he considered the resident's criminal possession of contraband—tobacco.

The Grievant denied that he pulled or shoved his lower-ranking colleague (the housing unit coordinator), as charged. The colleague testified that the Grievant did not place his hands on her or pull or shove her. The housing unit coordinator testified that the Grievant side-stepped her as he was entering the resident's room for the restraint. Upon review of the video evidence, I agree that the testimony and evidence does not prove by a preponderance of the evidence that the Grievant pulled and/or shoved his colleague when side-stepping her to enter the resident's room. For this reason, the Agency has failed to prove the uncivil conduct charged in Written Notice A as to the violation of the civility policy. Accordingly, Written Notice A must be reversed and rescinded, as the conduct charged is not proved.

An area supervisor testified for the Grievant that he was unaware of other instances of a highest-ranking staff member being disciplined for use of force. The area supervisor also testified that he did not understand that permission was required for retrieving contraband from a resident. The area supervisor also testified, on cross-examination, that this resident in question was known to have aggressive tendencies.

A former superintendent testified for the Grievant, and he stated that he had never experienced unprofessional or discourteous behavior from the Grievant. The former superintendent trusted the Grievant to make sound decisions, and the Grievant could be counted on for his hard work and dedication.

A former security coordinator also testified for the Grievant. He admitted that he has been counseled about engaging in restraints when serving as the highest-ranking staff member, but he does not believe permission is required to retrieve contraband from a resident.

The former security coordinator also testified for the Grievant. He testified that with shortage of staff, there are instances when the highest-ranking staff member has to be involved in use of force. He also admitted that he has been reprimanded under SOP 2.18, and that he used the Grievant as a witness at his own grievance hearing.

The Agency witnesses also testified that mitigation was considered, recognizing the Grievant's existing work record, but aggravating factors weighed against mitigating the Group II offense down to a lesser discipline.

Regarding Written Notice B, I find that based on the totality of the evidence and testimony, the Grievant failed to follow applicable policy when engaging in the use of force on August 10, 2024. The Agency has proved this charged misconduct and this failure to comply with policy properly constitutes a Group II offense.

Written Notice C

The Agency witnesses testified consistently and credibly about the charged series of conduct instances that the Agency combined into one Group II Written Notice. *See* Agency's Exhs. pp. 74-85.

The Director of Education and Rehabilitative Care testified to her review of available information and found the Grievant's pattern of conduct incredibly concerning regarding his disrespect of the agency and the juveniles in its custody. The most upsetting to her was the Grievant's interaction with the watch commander confirming the Grievant's more aggressive approach with residents. The Director testified that the Grievant, as a supervisor, is expected to mold behavior. The Director testified that, while any one instance detailed in the Written Notice may not alone justify a Group II offense, the combined instances of conduct included in Written Notice C justify the issuance of the Group II level offense. In response to the Grievant's cross-examination, the Director testified that the discipline was not issued until December because the Grievant was out on leave between August and December 2024.

As detailed in the written notice, the Grievant displayed a lack of professionalism and disrespect towards superiors, subordinates and residents in violation of DJJ's SOP Vol Iv-4.1-1.01 – Incident reports, Staff Code of Conduct and Administrative directive A- 2024-001 as well as DHRM policies 1.60 and 2.35. His lack of professionalism was on display in two series of

emails written to the director of security (his supervisor) and two of his subordinates where he complained about communication, shift assignments, and another subordinate's failure to come to work. It was also displayed in conversations he had with his supervisor when he referred to another coworker as the supervisor's "minion" and continued to demand more information about an employee's medical status after he was told that documentation had been given to human resources (HR). A couple days later it was displayed in a text message to his supervisor accusing her of leaving her staff "high and dry" and stating, "if this is how your team is going to run when teammates are in need then I don't want to be on this team." The supervisor testified that she communicated these issues to HR on August 8, 2024, however, the other matters occurred and the Grievant was placed on paid disciplinary leave (PDL) and no immediate action was taken.

As a result of the delay, HR became aware in October 2024 of an additional instance of the Grievant displaying disrespect. This time it was toward the residents and the treatment methods used by the Agency. The watch commander testified that she had a shocking conversation with him the first time she met him on July 12. During the course of the conversation, he repeatedly stated a believe that physical "discipline" was necessary to keep youth in line and that he preferred the methods used at another facility. The watch commander testified it was critical to the therapeutic model for there to be consistency and such an attitude would undermine the success of the model. She expressed this to the Grievant and he expressed his disagreement, stating his belief and experience is to "whoop ass."

The Grievant also failed to properly document a use of force incident. As explained by the Chief of Security and the Deputy Director of Education and Rehabilitative Care, entry of these incidents in BADGE is required to ensure that proper notifications and reviews are made whenever there is a use of force incident. This instance demonstrated a failure to perform his duties and make decisions in the best interest of the Agency.

The Grievant did not credibly deny or refute the occurrences in Written Notice C. Nor did the Grievant show that the conduct was not misconduct. Collectively, these violations arise to the level Group II Written Notice because of the negative impact, or potential impact, on Agency operations, the cohesion of staff as well as staff morale, and because the Grievant expressed a desire to use force in a way directly contrary to Agency policy. Because the Grievant was given counselling memorandums on June 2, 2024, and August 13, 2023, for similar behavior including failing to resolve work related issues and disputes in a professional manner and failing to properly document rounds and prepare required reports there was no reason to mitigate the formal discipline and termination was appropriate based on accumulated discipline.

While there was a period of delay of discipline, that delay was not unreasonable considering the Grievant was on PDL during much of the time. Delays may prevent the collection of relevant evidence or create the appearance of an improper motive. Such problems can impair an agency's ability to satisfy its burden of proof in disciplinary cases, but they are not necessarily fatal to a showing that discipline was warranted and appropriate under the circumstances, even if delayed. *See* EDR Ruling No. 2024-5710 (August 22, 2024)

Collectively, these violations satisfy a Group II Written Notice because of the negative impact, or potential impact, on Agency operations, the cohesion of staff as well as staff morale, and because the Grievant expressed a desire to use force in a way directly contrary to Agency Policy. Because the Grievant was given counselling memorandums on June 2, 2024, and August 13, 2023, for similar behavior (including failing to resolve work related issues and disputes in a professional manner and failing to properly document rounds and prepare required reports), the Agency did not mitigate the formal discipline and termination.

I find that based on the totality of the evidence and testimony, the Grievant's behaviors violated Policy 1.60. As a supervisor, the Grievant failed to perform his assigned duties and responsibilities with the highest degree of public trust, demonstrate respect for coworkers, supervisors, managers and subordinates, comply with the letter and spirit of Agency policies and procedures, and serve as a role model to his subordinates. I further find that based on the totality of the evidence and testimony, the Grievant's behaviors violated Policy 2.35 by undermining team cohesion, staff morale, individual self-worth, productivity, and safety. These failures to comply with policy collectively support the Agency's election of a Group II offense.

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. While the Grievant believed some ulterior motive or inconsistent discipline, this is an affirmative defense and it is the employee's burden to prove the affirmative defense. The agency has no burden to disprove the affirmative defense. *Rules* § VI(B)(1). In making a determination of whether inconsistent treatment supports mitigation, a hearing officer must assess, for example, the nature of the charges, the comparability of the employees' positions (including their positions within the organization and whether they have the same supervisor(s) or work in the same unit), and, crucially, the stated explanation for why the employees are allegedly treated disparately. Here, other than the scant allegation of others' similar conduct, there is insufficient evidence of such improper motive or disparate treatment. The mitigating factors offered by the Grievant 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 II Written Notice A is reversed and rescinded, so back pay and benefits for the five-day period of suspension are awarded. Based on findings above, Written Notices B and C must be and are upheld. A second Group II Written Notice normally results in discharge. In lieu of discharge, the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action. Although the Agency did not terminate the Grievant for the issuance of the initial two Group II Written Notices (A and B, arising out of the same incident), two Group II Written Notices support termination. When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires a lesser penalty be imposed on fewer charges. *Rules* § VI(B)(1). Because the Agency elected termination with Written Notice C, and it did not indicate an intent of lesser penalty for Written Notice C, I must uphold termination based on the remaining two Group II Written Notices.

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.

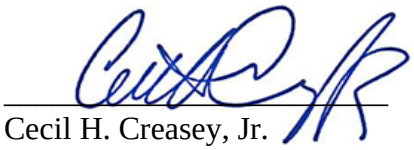
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[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].

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

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