COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 12296

Hearing Officer Appointment: June 2, 2025
Hearing Date: July 18, 2025
Decision Issued: July 22, 2025

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant was until recently employed at a facility (the "Facility") of the Department of Behavioral Health and Developmental Services (the "Department", "DBHDS" or the "Agency").

The Grievant requested an administrative due process hearing to challenge termination of his employment effective April 18, 2025, pursuant to a Group III Written Notice issued by management of the DBHDS as described in the Grievance Form A dated April 18, 2025. AE 20.

The Group III Written Notice was for violation of Written Notice Offence Codes 11 – Unsatisfactory performance; 13 – Failure to follow instruction or policy; and 99 – Other – Neglect of duty. AE 24.

The Grievant is seeking the relief requested in his Grievance Form A, including reinstatement of his previous position and back pay for lost wages. AE 22.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on June 11, 2025. The Grievant, the Facility's Chief Human Resource Officer ("HRO"), the Agency's advocate and the hearing officer participated in the call. The hearing date was scheduled for July 18, 2025.

The parties agreed that email is acceptable as a sole means of written communication.

Following the first pre-hearing conference, the hearing officer issued a Scheduling Order entered on June 13, 2025 (the "Scheduling Order") which is incorporated herein by this reference.

The hearing officer then issued an Amended Scheduling Order on June 17, 2025 ("the Amended Scheduling Order"), rescheduling the hearing to July 18, 2025, which is incorporated herein by this reference.

At the hearing, the Agency was represented by its advocate while the Grievant chose to conduct parts of the hearing himself and parts by his spouse, in her capacity as his advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses, and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency exhibits 1-6 (pages 1-194).[1] The Grievant did not submit any documentary exhibits.

No open issues concerning the attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Grievant
Representative for Agency
Witnesses

FINDINGS OF FACT

1. The Grievant was the Director of Social Work and Admissions (the "Director SWA"), previously employed by the Agency for approximately 10 years before the termination of his employment by the Agency. The Grievant served as the Director for about 6 years. Tape; AE 5, 19.

2. The Grievant, as the Director SWA, a member of the Central Management Team, CSB liaison for the whole Commonwealth, and supervisor, is held to a higher standard when it comes to compliance with Agency policies and procedures and is expected to set an example to his subordinates.

3. On January 8, 2024, the Grievant was issued a Notice of Improvement ("NOI"). AE 185.

4. On July 3, 2024, the Grievant was issued another NOI. AE 186.

[1] References to the agency's exhibits will be designated AE followed by the exhibit number.

5. On September 20, 2024, the Grievant was on duty to take calls for admissions but failed to answer his phone after repeated attempts. The Charge Nurse had to call an off-duty admission staff to handle a potential drop-off situation. The Grievant called the Charge Nurse back later that morning and stated, "I don't get paid to take these calls and I like to sleep in." AE 188.

6. On September 30, 204, the Grievant was taking admission calls but did not answer repeated admission calls that resulted in confusion and extra work on nursing staff. *Id.*

7. On October 6, 2024, the Grievant was on call to take admission calls but was not answering the phone when a CSB had repeatedly been trying to contact Facility admissions. This resulted in the Department's Deputy Commissioner being called and having to call the Grievant directly to facilitate the admission calls. *Id.*

8. On October 31, 2024, due to his failure and neglect of duties regarding these on-call incidents as well as other various performance issues, the Grievant was issued a Group I Written Notice, mitigated from a Group II, as well as another NOI. 188, 192.

Neglect of Duties: Manage the Social Work Department to Ensure Staff Have a Set Schedule and Work 8 Hours Per Day

9. On January 8, 2025, the Grievant was made aware of multiple staff in the Social Work Department not adhering to work schedules resulting in a large amount of lost work time. AE 5, 156-157.

10. Based on the review of December 1, 2024 – December 7, 2024, the Grievant's direct supervisor, the Chief Clinical Officer (the "Supervisor"), found that a total of 42 work hours were lost that week by six staff due to staff arriving late, leaving early, and leaving for extended periods during the workday. *Id.*

11. The Supervisor also advised the Grievant to review work hours for social worker A due to patterns of excessive time not at the Facility with no corresponding leave, excessive time working offsite with self-entered time, and accumulating comp time she self-entered into Kronos. *Id.*

12. The Supervisor informed the Grievant of the time sensitive nature due to A's probation ending soon. *Id.*

13. On January 17, 2025, when asked about this in supervision, the Grievant replied that he needed more time to review the information. The Grievant was directed

again to establish set work schedules for himself and the Social Workers. No follow-up on A's time issues was completed and her probationary period ended without addressing this problematic conduct. AE 6.

14. On March 20, 2025, the Supervisor discussed with the Grievant again the need for Social Work staff to have set work schedules and not to work remotely. The Supervisor informed the Grievant that, as the Social Work Department head, the Grievant would need to lead by example by establishing and adhering to a daily work schedule to reinforce the importance and gain compliance with staff. *Id.*

15. On March 24, 2025, the Supervisor initiated the process to establish a work schedule for the Social Work Department because the Grievant had failed to do so. *Id*, 127.

16. On March 26, 2025, the Supervisor completed another comprehensive time audit of the Social Work staff that revealed the same type of time abuses noted in the January 2025 audit. AE 6.

17. On March 27, 2025, the Supervisor provided the Grievant with a copy of the March 26, 2025 audit for social worker B, instructing him to add his documentation for the indicated days to explain the discrepancy between badge scans and Kronos records by the end of the day on March 28, 2025. The Grievant to date has not responded. *Id*, 126.

18. In his April 10, 2025 response email, the Grievant himself admitted that he "allowed for some flex in [the staff's] schedule." AE 11.

19. Additionally, the Grievant stated that he did speak to A before the beginning of the December holiday break or the few weeks between her return and medical leave in early February. AE 12.

20. The Grievant also admitted that he "was not aware of any expectation or requirement to set up the schedule in Kronos" and that he had "no knowledge or training to schedule employees in Kronos." *Id.*

Neglect of Duties: Implement an Adequate Social Work Coverage Plan

21. On January 27, 2025, the Grievant was asked for his Social Work Department coverage plan due to the upcoming extended leave of two Social Workers at the same time starting in February of 2025. The Grievant had not met with his staff yet to discuss the coverage issue. AE 6.

22. The projected absences had been known for over four months and multiple Social Workers were requesting to know the plan. *Id.*

23. The Grievant then stated to his Supervisor that his plan was that the Grievant would be covering the caseload. The Grievant had approved an additional three weeks of non-parental leave to be taken even though it was going to be a busy time of the year and another staff member was already scheduled out at that time. *Id.*

24. On February 14, 2025, the Grievant was informed that his and B's documentation was out of compliance, and this would need to be addressed with B through a NOI. *Id*, 143.

25. On that same day, it was clear that the Grievant' s coverage plan was not working. The Supervisor directed him to implement a new Admission staff schedule. AE 6.

26. The Central Office Transition Specialist was tasked to take over coordinating and facilitating EBL (Extraordinary Barriers to Discharge List) meetings due to continued reports that the meetings were disorganized, the Grievant was constantly distracted during the meetings, frequently jumping off meetings early, and was unfamiliar with the cases being discussed. *Id.*

27. The Supervisor managed the Admissions Specialist interview process and completed the Grievant's Human Resources ("HR") audit deficiencies. *Id.*

28. In his April 10, 2025 response email, regarding his deficiencies, the Grievant himself admitted that he "do[es] not abdicate [his] responsibility." AE 12.

29. Further, the Grievant stated that he was "unaware of any request of NOI for [B's] documentation." AE 14.

Neglect of Duties: Manage the Social Work and Admissions Department

30. Since January 10, 2025, the Grievant had failed to address repeated attendance problems with Admissions Department staff that had resulted in numerous uncovered shifts. AE 6-7.

31. On January 30, 2025, the Grievant requested for the Admissions Specialist position be posted for recruitment but failed to follow-up with emails from HR to approve the posting. After repeated requests from the Supervisor and HR for him to respond, to which the Grievant did not respond, the Supervisor ended up having HR send him the approval request and approved it for the Grievant. This caused a three-week delay in getting a critical position posted during a time of dire department coverage needs, resulting in frustration and complaints from existing staff who were having to provide coverage for an extended amount of time. AE 7.

32. On March 14, 2025, the Grievant sent an email to Admissions telling them "one administrator told [him] yesterday they cannot trust the census because the census [was] often wrong" when it was the Grievant's responsibility to ensure accuracy and take accountability. *Id*. Every department at the Facility uses the census for information such as admission dates, legal status, etc. Tape.

33. On March 31, 2025, the admission waitlist was up to 11, and the census was at capacity. No patients were under review by Admissions, and the Grievant was unable to prioritize the admission needs and had not started reviewing admissions or attempting to divert to private hospitals even through the waitlist had developed over the past four days. Even after being at work for four hours, the Grievant was still unable to prioritize admissions, could not provide information about the patients on the waitlist necessary to triage, had no patients under review, and had not begun attempting to divert admissions. *Id.*

34. The Central Office hospital admissions specialist met with Facility Admission staff weekly to assist with triaging patients and the use of BHL (Behavioral Health Link). She had brought admission issues to the Grievant's attention for the past year, such as no documentation in BHL and prioritizing admissions which remained a problem and had not been corrected by the Grievant resulting in the Facility continuing to be dependent on Central Office to manage the admission process. *Id.*

35. On April 3, 2025, the Grievant encouraged a non-direct care subordinate staff member that supported admissions to use sick leave rather than returning to work even though the Grievant provided approval to accommodate the work restrictions. This occurred during a high admission demand with a waitlist of 11 patients. *Id.*

36. In his April 10, 2025 response email, the Grievant admitted that he was "in agreement with bullet points beginning 1/30 & 3/14." AE 16.

Neglect of Duties: Manage the Social Work and Admissions Department Operations by Serving as a Role Model to Staff

37. On November 19, 2024, six Social Workers reported to the Supervisor that, during a meeting the previous week to implement the 72-hour Social Work Assessment process, the Grievant had told them that "management is trying to get [them] to quit by adding extra work because [they had] too many [S]ocial [W]orkers." When the Supervisor brought this to his attention, the Grievant denied saying this, despite all the staff present at that meeting reporting that he did make that statement. AE 72.

38. On that same day, during a Social Work Department meeting to discuss Social Work workflows, the Grievant stated that Social Work was being given all the

new work assignments whenever something new needed to be done or when another department did not want to do something. These comments turned the meeting into a complaint session resulting in the Supervisor having to spend the entire meeting to re-focus staff. *Id.*

39. On March 28, 2025, two Social Workers reported that the Grievant had come to talk to them about the directive that all Social Workers had a set work schedule and stated that he was frustrated and angry about it, telling them that he would not blame them if they quit. *Id.*

40. On April 1, 2025, the Grievant sent an email directly to DBHDS Commissioner, copying the Supervisor and Central Office hospital admissions specialist, regarding a potential admission complaint from a CSB Emergency Services Supervisor. The Supervisor had discussed the case earlier with the Grievant, and at no point did they discuss emailing the Commissioner. The Grievant justified himself by stating that he had known the Commissioner for years and that he had sent emails in the past to him though the Supervisor was unaware of any such emails regarding waitlist patients. AE 72-73.

41. On April 2, 2025, the CSB Emergency Services Supervisor sent an email to the Commissioner apologizing for her initial email due to her being relatively new to the CSB and being unfamiliar with his position. Importantly, she stated that she was encouraged by the Grievant to contact the Commissioner to see if he could expedite the admission to the Facility. *Id.*

42. The Grievant was aware, per the chain of command, that any correspondence with Commissioner level Central Office staff regarding an active Facility case would have to go through the Facility CEO. *Id.*

Failure to Follow Supervisor's Instructions/Directives: Follow Census Key

43. On February 13, 2025, the Supervisor corrected the census by un-bolding the patients who were designated as being in DSS custody. The key on the census did not indicate bolding and this was causing confusion as it looked like those patients were forensic because the only bolding required on the census was for forensic patients. The Supervisor told the Grievant to follow the census key. AE 71.

44. On March 14, 2025, the Grievant directed Admissions to bold the patients in DSS custody and changed the census key to require this designation. *Id.*

45. On March 17, 2025, the Supervisor told the Grievant to correct the designation. Bolding was unnecessary as the patients were already designated with three asterisks. The Grievant had not replied or complied with this directive. *Id.*

Failure to Follow Supervisor's Instructions/Directives: Prioritizing Urgency of Tasks

46. On March 13, 2025, the Supervisor met with the Grievant to instruct him to work with B to ensure all Social Work documentation was complete. The Grievant responded, saying that he would be spending most of the day catching up on emails, despite the Supervisor informing him that the documentation was his priority. The audit of charts for that week revealed numerous documentation deficiencies in Grievant's and B's cases. AE 71.

47. In his April 10, 2025 response email, the Grievant stated that he was "still recovering from pneumonia" and was in a "limited and depleted capacity." AE 17.

Failure to Follow Supervisor's Instructions/Directives: Performance Management of Employes

48. There were multiple requests in January 2024 from HR for missing employee information in HR files that were needed to be in compliance with accreditation surveys. AE 72.

49. On January 27, 2025, the Supervisor reviewed with the Grievant the need to get the HR files up to date. *Id.*

50. On February 4, 2025, the Facility CEO emailed the Grievant, directing him to provide the missing documentation. *Id.*

51. On March 12, 2025, HR emailed the Grievant indicating that his files were still incomplete. Accordingly, the Supervisor had to gather the required documentation and submit it to HR for the Grievant. *Id.*

Failure to Follow Supervisor Instructions/Directives: Participate in Quality Improvement Process

52. On November 21, 2024, the Quality Director sent the results of the Mock TJC survey and the need for corrective action plans to be submitted by December 4, 2024, which the Grievant did not submit. AE 72.

53. On December 6, 2025, the Supervisor reviewed with the Grievant a corrective action plan for the admission deficiencies, to which Grievant agreed. *Id.*

54. On January 27, 2025, the Grievant was reminded that the Mock TJC survey plan of correction audits for admissions were due by the end of the month. No audits have been completed or submitted by the Grievant to date. *Id.*

Insubordination: Unauthorized Trip Planning

55. On March 14, 2024, the Grievant had scheduled himself to take a patient on a visit to a placement on March 20, 2025. The Supervisor instructed the Grievant three times over the course of four days that he could not go on the visit due to coverage needs at the Facility. The Grievant questioned the Supervisor's authority and continued to make plans to go. After the Supervisor instructed him for the third time, the Grievant finally relented, as the Supervisor had already arranged for other staff to escort in his place. However, the Grievant continued to openly disagree with the Supervisor's decision to the treatment team. The Supervisor stressed to the Grievant that he was a department head and had other obligations such as admissions. AE 72, 129-139.

56. On the date of the scheduled trip, multiple staff had called out, requiring the Grievant to provide essential coverage at the Facility, which he would have been unable to perform had he gone on the visit. AE 72.

57. In his April 10, 2025 response email, the Grievant admitted that it had "been very difficult to keep up with email." AE 17.

58. The Grievant admitted that it was his "fault in not reading [the Supervisor's] message and fully expressed [his] understanding of [the Supervisor's] stepping in." The Grievant then assured the Supervisor that he would "never want to subvert his leadership and apologized for the part that [the Grievant] played in the confusion." AE 18.

Grievant's Defenses

59. The Grievant claimed that, until May 2024, the Facility Admissions "on-call" compensation violated the Fair Labor Standards Act ("FLSA") because the Facility did not pay an hourly rate to hourly Admissions employees. The Grievant asserted that this practice ceased in May 2024 but was not rectified until October 2024. From May to October 2024, the Grievant asserted that the Supervisor continued to expect the Grievant to schedule Admissions staff for on-call shifts without an FLSA-compliant hourly rate in place, thereby violating FLSA regulations. AE 20.

60. Additionally, the Grievant claimed that his physician provided "clear and reasonable accommodation recommendations, which were not considered prior to [his] termination." *Id.*

61. Specifically, the Grievant's physician, in an April 14, 2025 memo, stated that the Grievant had a history of attention deficient disorder ("ADD") and a sudden left-sided hearing loss. Accordingly, the physician recommended the following

accommodations: (1) defined shift responsibilities, such as assigning only one job description per shift, determined by his supervisor, to ensure clarity; (2) clear and consistent written and verbal communication when there were any changes to the Grievant's job responsibilities; and (3) regular check-ins with the Grievant's supervisor at least every 2 weeks with a written summary of each meeting provided afterward which would help establish a shared understanding of his responsibilities and any agreed upon expectations. AE 28.

62. In an April 17, 2025 email, the Grievant claimed that the Supervisor's actions adversely affected his ADD disability and that their relationship required intervention with ADD-related accommodations. AE 74.

63. The Grievant also claimed, in his April 10, 2025 email, that "a case could be made that the [Supervisor] [was] seeking to terminate [him]. The process the [Supervisor] [had] put [him] though [was] incredibly frustrating and hostile." AE 18.

64. Specifically, the Grievant claimed in the hearing and in his Grievance Form A that there was a pattern of upper management prioritizing punishment over collaboration, creating a challenging and unproductive work environment, and resulting in a hostile work environment. Specifically, the Grievant cited that the Supervisor's approach resulted in the highest turnover rate (up to 120% annually for nursing staff), the highest in any Facility in the Department. The Grievant further claimed that the Supervisor repeatedly stated in leadership meetings, "If the staff doesn't like it, they can leave." AE 21.

65. The Supervisor provided significant, material supervision to the Grievant, meeting with him at least weekly and frequently communicating with him clearly and unequivocally via email. In a management survey of the social work treatment team, the comments by Grievant's subordinates concerning his leadership performance and qualities were overwhelmingly negative.

66. The testimony of the Agency witnesses was credible and consistent. The demeanor of such witnesses was open, frank, and forthright.

67. By contrast, the Grievant's testimony was inconsistent. For example, the Grievant testified to the effect that he "had great respect for [the Supervisor]"; that he did not blame the Supervisor; and that he was not saying anything negative toward the Supervisor other than they were having communication challenges and that the Grievant received insufficient supervision.

68. During the hearing, the Grievant admitted that he had a problem with the Supervisor's personality; that he did not respond to certain emails from the Supervisor and that he does not do email well; that concerning the site visit

referred to in Finding ¶55 above, Grievant needed to be at the Facility; and that things "fell through the cracks."

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated DHRM Policy 1.60, *Standards of Conduct*. AE 96.

The Standards of Conduct (the "SOC") provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serves to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

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; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, *Standards of Conduct*, management is given 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. Accordingly, 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 is not a "super-personnel officer" and 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. *Id.*

The Grievant did not follow the applicable state and agency policies.

Specifically, Center Instruction No. 1323, *Attendance Policy* provides that "[a]ll [Facility] employees are considered essential to the efficient operation of the facility and are expected to work all hours and/or shifts scheduled to meet the facility needs." AE 76.

Additionally, Center Instruction No. 1370, *Timekeeping Records* provides that "[e]ach employee of [the Facility] is responsible for the information contained in their time and leave records. All employees will use the Kronos computerized timekeeping system. Employees may not adjust or establish their own schedules without supervisory direction or permission." AE 86.

Furthermore, DHRM Policy 1.60, *Standards of Conduct* provides a series of offenses that will typically attract disciplinary action:

> "Failure to follow supervisor's instructions/directives
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> This offense focuses on the ability of agency managers and supervisors to direct work and the workforce. Management must demonstrate the employee was given proper, reasonable and lawful instructions and the employee improperly failed to follow the instructions or perform the assigned work regardless of whether the failure to act was intentional or unintentional.
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> …
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> Insubordination
>
> Involves intentional defiance of supervisory authority; refusal to obey a reasonable and lawful order/directive, instruction or job duty as assigned by a manager or supervisor authorized to issue such directives.
>
> …
>
> Neglect of Duty

Intentional or negligent actions in attending to or failing to perform job duties."

AE 122-124.

As such, pursuant to DHRM Policy 1.60, *Standards of* Conduct, the Grievant's actions could clearly constitute a Group III offense, as asserted by the Department:

> "Group III Level Offenses generally include acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations. Examples may include: Absence of three or more consecutive work days without approval; safety/health infractions that endangers the employee and/or others; unethical or illegal conduct; significant neglect of duty, disruption of workplace, or other serious violations of policy, procedures or laws."
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> AE 120.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

Regarding neglect of duties, the Grievant failed to ensure the Social Work staff had a set schedule and worked 8 hours per day, resulting in numerous work hours lost to the Agency that rose to the level of fraud, waste, and abuse. The Grievant additionally failed to implement an adequate Social Work coverage plan, did not effectively manage the operations of the Social Work and Admissions Department, and failed to serve as a role model to staff, resulting in considerable operational hardship for the Agency.

Regarding the failure to follow supervisor's instructions/directives, the Grievant repeatedly refused to adhere to the established census key, despite multiple reminders from the Supervisor. The Grievant proceeded to unilaterally alter the key to reflect his own preferences, creating confusion within the department. The Grievant also declined to prioritize an urgent assignment from the Supervisor. While he was recovering from an illness, this did not justify ignoring a direct and time-sensitive directive. Additionally, the Grievant failed to gather the missing employee information, ultimately leaving the task to the Supervisor. The Grievant also failed to submit critical documentation for the Mock TJC survey, despite repeated reminders.

Regarding insubordination, the Grievant repeatedly did not respond to the Supervisor's directions over long periods of time, challenged the Supervisor's authority by continuing to plan for a patient placement visit even after being explicitly told on three separate occasions that he was not permitted to go, and made comments to staff undermining the Supervisor and Agency.

The Grievant's neglect of duties, failure to follow supervisor's instructions/directives, and insubordination directly undermined the mission and morale of the Facility, as revealed in the survey of Grievant's staff. His actions failed to support (and, in fact, greatly disrupted) the

coordination and quality of services the Facility aimed to provide. Such conduct is incompatible with the expectations of someone in a department leadership and management-level role and represents a clear breach of his professional responsibilities. His actions and inactions, both directly and indirectly, compromised the safety and wellbeing of staff and patients.

As Director of Social Work and Admissions, the Grievant was in a position of great leadership and authority. According to his Employee Work Profile, 10% of his Core Responsibilities was to "[s]erve[] as [m]ember of Center Management Team" where he was to "[w]ork[] with other Leadership & Management team members in quality improvement activities to ensure that services provided by this facility [were] consistent with the Center's mission." AE 174.

EDR has consistently held supervisors, such as Grievant in this case, to a higher standard. As EDR stated in case No. 9872, in evaluating misconduct by a supervisor that to a non-supervisory employee would have been a Group I, the discipline was increased to a Group II, stating, "This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision." *See, also*, DHRM Ruling 2015-3953:

The issue of whether an agency can hold a supervisor to a higher standard is a policy issue as well as a procedural issue. As discussed above, the Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy. DHRM has previously determined that "agencies may hold supervisors and managers to a higher degree of responsibility and leadership than non-management employees."

The *Rules for Conducting Grievance Hearings* require that a hearing officer must show deference to how the agency weighs the supervisory status of an employee in determining the appropriate level of discipline. Here, the agency determined that the Grievant's misconduct was more severe based, in part, on his position as a department head and supervisor. Policy permits the agency to hold supervisory employees to a higher standard than non-supervisory employees, and accordingly the hearing officer defers to the agency's weighing of that factor.

The Grievant's current misconduct is further aggravated by a history of similar disruptive behavior demonstrated in the various NOIs and the Group I Written Notice he received in 2024. In short, the Grievant's recent tenure at the Facility has been marked by a consistent pattern of unsatisfactory performance.

Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

DHRM's *Rules for Conducting Grievance Hearings* provide in part:

> DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as

> "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." By law, the hearing officer must "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency." Examples of "mitigating circumstances" to be considered by the hearing officer include, but are not limited to:
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> - whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule;
> - whether the discipline is consistent with the agency's treatment of other similarly situated employees; or
> - whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances."
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> *Rules* § VI(B)(2) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding, the Department did consider mitigating factors in disciplining the Grievant. AE 4.

Accordingly, because the Department assessed mitigating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

The Grievant has asserted that the discipline was unwarranted. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced in the Written Notice, the Form A, the hearing, those referenced herein, and all of those listed below in this analysis:

1. the demands of the Grievant's work environment
2. the Grievant's service to the Agency of about 10 years;
3. his overall "Contributor" rating during his 2024 Performance Evaluation;
4. previous "Extraordinary Contributor" ratings;
5. his very hard work for the Facility;
6. the long hours worked by the Grievant;
7. the shortage and high turnover of staff at the Facility; and
8. the success of the Social Work Department under his leadership.

AE 10-22, 183.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing

officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offenses were very serious. Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness.

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; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, *Standards of Conduct*, and the SOC, management is given 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. Accordingly, 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 is not a "super-personnel officer" and 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. *Id.*

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts de novo to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The hearing officer decides for each of the offenses specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

The Grievant alleged certain affirmative defenses but these were not adequately developed at the hearing. For example, the Grievant alleged retaliation from the Supervisor/the Agency, discrimination based on his disabilities, and hostile work environment, but did not begin to bear his burden of proving these claims.

In order to succeed with his retaliation affirmative defense, the Grievant must show that (1) he engaged in a protected activity; (2) he experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

If the Agency presents a nonretaliatory business reason for the adverse employment action, the Grievant must present sufficient evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

The Grievant experienced an adverse employment action when he received the Group III Written Notice on April 18, 2025. AE 4.

The Grievant appears to suggest that the protected activity he engaged in was due to him attempting to follow the FLSA which the Agency allegedly violated up till October 2024. The Grievant claims that the on-call system violated the FLSA, and thus he resisted continuing to schedule staff under that system after May 2024.

However, there is no causal link between the protected activity and the adverse action. Without passing judgment on the legal merits of the underlying wage-and-hour compliance issue, even assuming that the Grievant engaged in said protected activity, there is a disconnect between that activity and the adverse action under review. The immediate consequences following the Grievant's refusal to schedule on-call staff under the prior system were a Group I Written Notice and a NOI issued on October 2024, not the Group III Written Notice that resulted in termination that is the subject of this grievance. AE 188-192.

Further, even assuming the Grievant did engage in a protected activity and the requisite causal link exists, it is clear that the Supervisor/Agency had nonretaliatory business reasons for the disciplinary action taken against Grievant. The Agency has demonstrated that the Grievant violated important state and Agency policies. Because the Agency had non-retaliatory reasons for its disciplinary actions, and the Grievant has offered no evidence to suggest that those reasons are mere pretext, the Grievant has not met his burden to prove the Agency's disciplinary action was retaliation.

To prevail at a hearing on a claim that the employer's disciplinary action was motivated by prohibited discrimination, a grievant must ultimately prove by a preponderance of the evidence that any nondiscriminatory business reason the employer proffers for its disciplinary action is a pretext for discrimination. See *Strothers v. City of Laurel*, 895 F.3d 317, 327-28 (4th Cir. 2018).

The Grievant argued that he was being discriminated against due to the Agency's failure to accommodate his disability.

The Grievant offered no evidence, however, to support any assertion that the Agency's disciplinary action was intended to punish him for having a medical condition or was otherwise discriminatory or retaliatory in nature.

Indeed, the Agency was not aware that the Grievant had a disability as the Grievant personally failed to submit any formal documentation of his disability requirements to the Agency upon starting work. The Grievant only alerted the Agency to his disabilities via his physician's memo dated April 14, 2025, five days after he was served his due process letter on April 9, 2025. AE 5.

In any case, the Agency had business reasons for the disciplinary action taken against the Grievant. The Agency has clearly demonstrated that the Grievant engaged in the misconduct of neglect of duties, failure to follow supervisor's instructions/directives, and insubordination.

Also in this regard, the IHO finds the reasoning in *DeWitt v. Sw. Bell Tel. Co.,* 845 F. 3d 1299 (10th Cir.2017) persuasive. The ADA prohibits employers from unlawfully discriminating against an employee by failing to make reasonable accommodations to the **known physical or mental limitations** of an otherwise qualified individual with a disability who is an employee. To facilitate the reasonable accommodation, the federal regulations implementing the ADA envision "an interactive process that requires participation by both parties." However, before the interactive process is triggered, the employee must make an adequate request, putting the employer on notice.

The ADA does not require employers to reasonably accommodate an employee's disability by overlooking past misconduct-irrespective of whether the misconduct resulted from the employee's disability. The Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance makes clear that the requirement to provide reasonable accommodations under the ADA is "always prospective," and that "an employer is not required to excuse past

misconduct even if it is the result of the individual's disability." U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT AT NO. 36.

"Excusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an *after-the-fact excuse* is not a required accommodation under the ADA." *Davila v. Quest Corp., Inc.,* 113 Fed.Appx. 849, 854 (10th Cir. 2004) (emphasis added).

For a claim of a hostile work environment or harassment to succeed, a grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or conduct; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency. *See generally White v. BFI Waste Services*, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

"[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited retaliation or discrimination. EDR Ruling No. 2017-4391.

The Grievant fails to establish that the Agency's treatment of him created a hostile work environment. As established above, the Grievant has not shown that the alleged conduct by his supervisor was based on a protected status or conduct. There was no prohibited retaliation or discrimination. Ultimately, the Supervisor supervised the Grievant's work product within the scope of his authority. Accordingly, all the actions conducted by the Agency were within the scope of its authority to manage the affairs of State government.

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group III Written Notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action concerning the Grievant is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 and 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]

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

ENTER: 7/22/25

John Robinson

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).