

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 12287

Hearing Date: August 1, 2025
Decision Issued: August 4, 2025

PROCEDURAL HISTORY

On January 22, 2025, the Agency issued Grievant a Group II Written Notice of disciplinary action. The offense was noted as failure to follow instructions or policy, identified as offense date October 30, 2024.

The Grievant timely filed a grievance to challenge the Agency's disciplinary actions, seeking removal of the Group II offense. The matter advanced to hearing. On June 2, 2025, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for July 2, 2025, the first available date available for the parties. For good cause shown, the hearing was continued and rescheduled for August 1, 2025. On August 1, 2025, the hearing was held in-person at the Agency's facility.

The Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits or Grievant's Exhibits, respectively. The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and arguments presented.

APPEARANCES

Grievant
Agency Representative
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

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

BURDEN OF PROOF

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

APPLICABLE LAW AND OPINION

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

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

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

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

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer*

Serv., 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

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

Under DHRM Policy 1.60, *Standards of Conduct*, Group II offenses include acts and behavior of a more serious and/or repetitive nature that require formal disciplinary action. This level is appropriate for offenses that seriously impact business operations and/or constitute a neglect of duty involving major consequences, insubordinate behaviors, and abuse of State resources, etc. An accumulation of two Group II notices normally should warrant termination. Agency Exh. 4, p. 8. Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy or procedure are specific examples of a Group II offense.

DHRM Policy 5.05, *Employee Learning and Development*, provides an overview of the requirements each agency needs to conduct a successful learning and development program. Grievant Exh. 1.

The Offense

The Group II Written Notice, issued by the Director of Instructional Programs on January 22, 2025, detailed the facts of the offense, and concluded:

On August 9, 2024, a directive was given to you, by me, [], Director of Instructional Programs. You were informed that you had until the date of October 30, 2024, to obtain your Adobe Certification. You were supplied with the necessary training modules via the GMetrix Platform. On August 2, 2024, it was explained to you via email that the GMetrix Platform is a platform for learning and training for your certification. In that same email, it was stated that for the Spring semester and beyond, you will use the ICEV curriculum in your Ad Design courses and that your students will work toward Adobe certification through your instruction. You did not meet this directive as confirmed by the Director of Testing and Accountability, and by you, in an email to me on October 31, 2024.

In conclusion, your actions violate the following responsibilities outlined in your DJJ Employee Worker Profile (EWP) which states:

A. Professional Knowledge

The teacher demonstrates an understanding of the curriculum, subject content, and the developmental needs of students by providing relevant learning experiences.

- Demonstrates an accurate, current, and specific knowledge of the subject matter and a working knowledge of relevant technology.

G. Professionalism

The teacher demonstrates a commitment to professional ethics, collaborates and communicates appropriately, and takes responsibility for personal professional growth that results in the enhancement of student learning.

- Incorporates learning from professional growth opportunities into instructional practice and reflects upon the effectiveness of implemented strategies.
- Identifies and evaluates personal strengths and weaknesses and sets goals for improvement of personal knowledge and skills.
- Participates in DOE initiatives designed to address student learning gaps promote on-time graduation.
- May be assigned other duties or locations to meet agency and division needs.
- Works in a collegial and collaborative manner with administrators, other school personnel, and the community to promote students' well-being, progress, and success.

Additionally, your actions violate DHRM Policy 1.60, Standards of Conduct which states that all state employees are expected to:

- Perform assigned duties and responsibilities with the highest degree of public trust.
- Maintain the qualifications, certification, licensure, and/or training requirements identified for their positions.
- 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, the Conflict of Interest Act, and Commonwealth laws and regulations.
- Work cooperatively to achieve work unit and agency goals and objectives.

Agency Exh.1, pp. 15-16. For circumstances considered, the Written Notice stated,

[Grievant] has access to the GMetrix platform which is a learning platform to become Adobe certified. [], his direct supervisor, worked with the DOE IT team to get it loaded on his computer. Additionally, he had at a minimum, 80 hours to complete the learning modules during the weeks of September 23, 2024 through October 4, 2024 while school was not in session for students. Also, every Wednesday, school ends at 10:30, which gives [the Grievant] a minimum of 3 hours each Wednesday to work in the GMetrix teaming platform.

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

The Agency employed the Grievant as an advertising design instructor for many years, with no prior, active formal disciplinary actions.

The Agency witnesses testified consistently and credibly about the facts and conduct charged in the Written Notice. The Director of Instructional Programs testified to her directive to the Grievant to obtain the Adobe certification for his classes, so that the students could also achieve the Adobe certification (as the students' instructor must be certified for the students to obtain certification). The Director would have provided an instructor-led class for the Grievant, but the Director testified that the Grievant never specifically asked for that. The Grievant was provided a software learning platform (GMetrix). The Grievant is the only instructor for these classes. Because of the internal delay in providing the Grievant with the software learning platform, the deadline for the Grievant to obtain certification was changed from July 2024 to October 30, 2024. The Grievant had the summer break to work on the certification as well as a two-week intercession in September when students would not be using the classrooms. The Grievant did not obtain the certification by October 30, 2024, and he did not attempt or start the certification by that date. Email messages document the directive to obtain certification and the Grievant's failure to do so. Agency Exh. 2, pp. 1-50.

The Assistant Principal, the Grievant's direct supervisor, testified to her repeated follow up with the Grievant on his status and progress toward Adobe certification. She testified that the Grievant operated independently without being open to support and assistance. The Grievant expressed disinterest in the Adobe certification, but she iterated to him that the mandated certification was not his to ignore. The certification requirement was intended to provide the students with additional certifications to help them with career options. Email messages document the assistant principal's follow up efforts with the Grievant. Agency Exh. 2, pp. 21-28.

The Grievant testified that he expected the Agency to arrange for him an instructor-led class to prepare him for the certification. The Grievant testified that he expressly requested the instructor-led class up front. While the Director of Instructional Programs offered support for that option if the Grievant pursued such a class, the Grievant did not revisit that issue with the Director or ever express that he was awaiting such an accommodation. The Grievant admitted that, other than taking a practice test on the software leaning platform, he did not start or try the learning program for certification by October 30, 2024.

The Grievant questioned the efficacy of obtaining his Adobe certification because he believed his students were not positioned to become Adobe certified. The Grievant asserted that the Agency did not honor Policy 5.50, by not providing adequate time and space for his certification preparation. As raised in his written grievance, the Grievant maintained he never had the time to perform the GMetrix training modules. The Grievant asserted that he otherwise met or exceeded established job performance expectations, and the Agency did not contend otherwise.

The Grievant did not suggest or advance a retaliatory, discriminatory, or other improper motive for the discipline, but he argued for rescission or reduction of the Written Notice. The Grievant, post-discipline, obtained the Adobe certification without any expressed difficulty, but

two semesters after he was first expected to obtain the certification. Accordingly, the Grievant maintained that the current discipline is excessive for the offense.

Analysis

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

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

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

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

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

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, including the Grievant's

admissions that mostly confirm the conduct cited in the Written Notice, I find that the Agency has proved the charged conduct, which is sufficient to satisfy a Group II Written Notice.

In general, agencies are entitled to expect good judgment and performance from its employees. Failure to meet these expectations may constitute unacceptable conduct, even in the absence of specific policy instruction. *See*, for example, EDR Ruling No. 2024-5710. I find that the instance of conduct charged in the Written Notice constitutes at least the level of more serious misconduct contemplated for a Group II level offense. The affirmative refusal to even attempt to obtain certification before October 30, 2024, could be viewed as serious insubordination. I do not find credible the Grievant's assertion that he was awaiting an instructor-led class before starting the certification process, as there was ample opportunity for the Grievant to note that in response to multiple email messages about the matter. Further, I find that the Agency provided the time and space for the Grievant to obtain the certification training by October 30, 2024.

The Agency's directive for the Grievant to obtain the Adobe certification was clear and not unreasonable, and the Grievant's refusal to comply was a refusal to follow supervisor's instructions. Contrary to the Grievant's approach to the grievance, the Agency has the prerogative to issue discipline for conduct that does not meet the Agency's standards of conduct. This judgment of work performance falls within the Agency's discretion. The Agency could have elected lesser discipline along the continuum of progressive discipline, but it is not required to exercise informal discipline in lieu of formal or a lesser written notice for misconduct. Accordingly, based on the definitional description of a Group II offense, I find the Agency has proved the conduct charged in the written notice and that the conduct satisfies a Group II written notice. Accordingly, I find that the Group II written notice is consistent with policy.

Mitigation

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

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." 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. In this matter, the Grievant presented no mitigating evidence to challenge the Agency's action, such as disparate disciplinary treatment or ignored request for accommodation.

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 Grievant's ultimate completion of the Adobe certification directive could be viewed as a mitigating factor, although it came after the issuance of the discipline. There was no indication by the Agency that the ultimate completion of the certification was considered mitigation for the charged conduct. The Agency's mitigation decision is fairly debatable. Because I am not a "super-personnel officer," even though I may have elected lesser discipline, I lack the authority to reduce the discipline under these circumstances. The Grievant has not shown any other recognized mitigation factor, such as some improper motive, disparate treatment, or an unsatisfied request for accommodation.

DECISION

For the reasons stated herein, the Agency's Group II Written Notice must be and is upheld.

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.

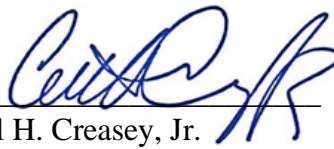
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.