# *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. 12328

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| Hearing Date: | September 22, 2025 |
| Corrected Decision Issued: | September 25, 2025 |
| Nunc Pro Tunc | September 24, 2025 |

## PROCEDURAL HISTORY

On May 20, 2025, the Agency issued Grievant a Group II Written Notice of disciplinary action. The offense was failure to adhere to established work schedule, failure to follow instructions or policy, and insubordination on April 22, 2025.

The Grievant timely filed a grievance to challenge the Agency's disciplinary action, seeking recission of the Group II offense. The matter advanced to hearing. On August 18, 2025, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. The hearing was scheduled for September 11, 2025, the first available date for the parties. On motion of the agency, for good cause shown, the hearing was continued to September 22, 2025. On September 22, 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 and Grievant's Exhibits, respectively.[1] The record closed at the conclusion of the hearing. The hearing officer has carefully considered all evidence and argument presented.

## APPEARANCES

Grievant
Agency Representative
Advocate for Agency
Witnesses

[1] The Agency's objection to Grievant's Exhibit No. 6 was sustained.

## 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 likely than not; evidence that is more convincing than the opposing evidence. 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 Operating Procedure 135.1, *Standards of Conduct*, Group II offenses include acts and behavior of a more serious or repetitive nature. 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. 10, p. 62. 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.

Under Operating Procedure 110.2, *Overtime and Schedule Adjustments:*

III. A. Supervisors should carefully monitor schedule adherence.

. . .

D. Management may reschedule or adjust employee work schedules as necessary to manage the operation or the financial resources of the agency.

. . .

V. A. Adjusting Work Schedules

2. To the extent possible, employee requests and needs should be considered when making schedule adjustments.

Grievant Exh. 11, p. 7.

## The Offense

The Group II Written Notice, issued by the warden on May 20, 2025, detailed the facts of the offense, and concluded:

> On April 22, 2025, you were advised by your supervisor, Unit Manager [P] that you were not allowed to adjust your work schedule and that you needed to make sure that you report to work at your assigned tune, however you continued not to work your established schedule as instructed by Unit Manager [P] (Violation of Operating Procedure 135.1, Standards of Conduct and Operating Procedure 110.1 Hours of Work & Leave of Absence). Also, you were very unprofessional in advising Unit Manager [P] of what you are going to do and telling her to stop contacting you which was done through emails. This is considered disruptive behavior as well as insubordination towards supervision.

Agency Exh. 1. For circumstances considered, the Written Notice stated:

> [Grievant] has been employed with DOC for 2 ½ years and currently has no active discipline on file.

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 a counselor, with no other active, formal discipline. The Agency witnesses testified consistently and credibly about the charged conduct in the Written Notice. The grievant's supervisor testified consistently with the above facts of the Written Notice. The supervisor, other than reporting the Grievant's conduct of not working her established schedule, was not involved in the issuance of the Written Notice. The supervisor testified that her directive to the Grievant to continue working her established schedule was clear and direct, yet the Grievant disagreed with and ignored the instruction. Agency Exh. 4. The warden who issued the Written Notice testified that the conduct documented by the Grievant's own email messages sufficed to establish the failure to follow supervisor's instructions in an insubordinate manner. Agency Exh. 4. The warden testified that the level of discipline was approved by regional command. The warden testified that the Grievant never voiced any complaint of coercion when the Grievant selected her work schedule of 8:30 a.m. to 5:00 p.m. As for mitigating factors, the warden testified that there were insufficient mitigating factors to reduce or eliminate the Group II offense. The warden testified that fixed work schedules were implemented in March 2025 to better account for employees' adherence to work attendance, and that the Grievant initially was allowed to select her schedule that she now seeks to disregard. The warden was credible in denying any ulterior motive for issuing the Written Notice.

Another counselor testified for the Grievant, but the testimony did not establish anything other than a normal work relationship between the Grievant and her supervisor. The Grievant testified that she was pressured or coerced by her previous supervisor into selecting the work schedule of 8:30 a.m. to 5:00 p.m. She testified that she was forced to make her selection within a day. The documentary evidence, however, shows that her supervisor at the time requested by email of Friday morning, March 21, 2025, a selection of work schedule from four choices:

> 7:00 a.m. to 3:30 p.m.
> 7:30 a.m. to 4:00 p.m.

8:00 a.m. to 4:30 p.m.
8:30 a.m. to 5:00 p.m.

Agency Exh. 5, p. 17. The Grievant, on Tuesday afternoon, March 25, 2025, notified of her selection of 8:30 a.m. to 5:00 p.m. Agency Exh. 5, p. 16. This selection was not made within one day; the time span was from Friday morning to Tuesday afternoon, and nothing supports any coercion to choose the schedule the Grievant selected. The Grievant did not factually dispute the charged misconduct. The Grievant's stance is that supervisory staff should have cooperated with her request to change her work schedule, and she should have been allowed to change her work schedule unilaterally, without approval. She testified that this Written Notice caused her to miss the 1.5% pay bonus. Grievant Exh. 2.

## 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. The Agency is justified in expecting its employees to adhere to established work schedules. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has proved the misconduct charged in the Written Notice—failure to follow supervisor's instruction in an insubordinate manner.

In general, agencies are entitled to expect good judgment and performance 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. I find that the misconduct charged in the Written Notice—not adhering to assigned work schedule—was proved by a preponderance of the evidence. Further, I find that the misconduct constitutes failure to follow supervisor's instruction and constitutes a Group II offense.

This judgment of misconduct 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 less formal discipline, when the facts support the offense. Accordingly, I find that the Group II discipline is consistent with policy, as failure to follow supervisor's instruction is a recognized 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. The Grievant has not borne her burden of proving that her conduct was justified or that her selected work schedule was coerced. While the Grievant also believed some ulterior motive for the discipline, there is insufficient evidence of such improper motive.[2] 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 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

[2] The Grievant made mention of having made a prior request for accommodation under the Americans with Disabilities Act (ADA), but her evidence and testimony did not establish the accommodation request or show how it was related or relevant to the present disciplinary grievance. The Grievant also mentioned the lack of air conditioning at the facility and a shortage of radios, yet the evidence and testimony failed to connect such conditions to her failure to adhere to her established work schedule.

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.[3]

[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

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