



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11775

Hearing Date: April 22, 2022

Decision Issued: May 12, 2022

PROCEDURAL HISTORY

On November 1, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for knowingly making a false official statement.

On November 30, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 20, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 22, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
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

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

The Virginia State Police employed Grievant as a Trooper in one of its Divisions. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency placed a License Plate Reader (LPR) at the south end of the Bridge/Tunnel. Troopers could park their vehicles at the Bridge crossover and access the LPR to determine if a vehicle driving through the tunnel was stolen.

In December 2020, staff attended an "Area meeting" in which Agency managers discussed a new policy governing LPR. Grievant did not attend that meeting.

On or about February 22, 2021¹, Grievant met with Sergeant B to discuss Grievant's in-car camera video of Grievant's traffic pursuit on January 30, 2021. On that day, Grievant was monitoring the LPR and which alerted to a stolen vehicle. Sergeant B told Grievant that Area policy required two or more troopers to monitor the LPR system at the Bridge.

¹ The actual date of the meeting may have been February 12, 2021, February 21, 2021, or February 22, 2021. The exact date of the meeting is not significant.

On February 27, 2021, Grievant was in his vehicle near the south end of the Bridge. Grievant opened the LPR. A stolen vehicle passed through the LPR and Grievant was alerted. The vehicle was traveling from the south to the north end of the tunnel.

Trooper C's shift began at 2 p.m. on February 27, 2021. She did not go to the Bridge prior to the pursuit. She did not see Grievant before the pursuit began. Trooper C was at the Pughsville Road Exit. The Pughsville Road Exit is approximately 3.7 miles south of the Bridge and Grievant's location at the time he was operating the LPR. She did not know that Grievant was at the Bridge. She did not know Grievant was operating the LPR. She was not making a traffic stop at Pughsville Road, she was monitoring traffic.

Grievant began following the stolen vehicle. Grievant requested the assistance of another trooper. He did not specifically name Trooper C.

At approximately 3:17 p.m., Trooper C heard Grievant's radio call about the stolen vehicle. Trooper C radioed Dispatch and advised she was enroute from Pughsville Road. Grievant could hear Trooper C's radio call.

Sergeant B was listening to Grievant's statements over the radio. Sergeant B notified Grievant not to stop the stolen vehicle until he had another unit with him. Grievant acknowledged Sergeant B's instruction and continued to follow the stolen vehicle. The stolen vehicle left the interstate and Grievant followed. The stolen vehicle accelerated to get away from Grievant. Grievant activated his vehicle emergency lights and siren in an attempt to have the stolen vehicle pull over to the side of the road. The stolen vehicle disregarded Grievant's emergency signals and continued to travel at a high speed. Grievant pursued the vehicle. At approximately 3:29 p.m., Sergeant B decided to end the pursuit because Grievant did not have another trooper assisting him. Trooper C had not caught up with Grievant at the time the pursuit was terminated.

Following the pursuit, Sergeant B and Grievant spoke by telephone. Sergeant B reminded Grievant that they had just had a conversation about having another trooper at the Bridge when Grievant was monitoring the LPR. Grievant told Sergeant B that Grievant was not alone and Trooper C was with him. Sergeant B asked Grievant why Trooper C was not with him when he identified the stolen vehicle. Grievant said that Trooper C had just pulled out and stopped a vehicle and then seconds later the stolen vehicle passed by.

At 4:54 p.m., Grievant called Trooper C. They talked about Grievant's pursuit and Grievant told Trooper C that Grievant talked to Sergeant B and "kind of blamed it on" her. Trooper C asked Grievant what that meant. Grievant he told Sergeant B that Trooper C was sitting with Grievant at the Bridge with Grievant and then she left to stop at car at Pughsville. Grievant said he told Sergeant B that when Grievant called out the stolen vehicle Trooper C was enroute from Pughsville. Grievant told Trooper C "if [Sergeant B] asks you, tell him you were with me." Trooper C questioned why she would do that. Grievant said because he did not want to get yelled at.

Trooper C called Sergeant B. Trooper C was upset and told Sergeant B that Grievant called Trooper C and indicated he “threw her under the bus” with Sergeant B. Trooper C told Sergeant B that she was not with Grievant and she did not know that Grievant was at the Bridge monitoring the LPR.

On June 21, 2021, First Sergeant Attorney concluded that the report describing Grievant’s actions constituted Brady/Giglio material. “As such, all jurisdictions in which [Grievant] would be testifying in should be made aware of this incident.”²

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” General Order ADM 12.02(12)(a). Group II offenses “include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal.” General Order ADM 12.02(13)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order ADM 12.02(14)(a).

General Order ADM 11.00 governs the Standards of Conduct. Section 1 provides:

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of Department business and the maintenance of confidence by citizens of the Commonwealth.

Section 7(a) provides:

Employees shall be honest and truthful and shall not lie, make any intentionally deceptive statements, misrepresentations and/or omissions during any job-related function ... and/or administrative investigation involving themselves or other employees.

Section 7(i) provides:

Violations of this standard include, but are not limited to:

(3) Failing to answer questions truthfully, accurately, and completely specifically directed and related to official duties or job fitness during administrative investigations and inquiries or to intentionally deceive, omit information or to tell a lie in order to mislead a supervisor, the court, or an officer of the court. ***

² Agency Exhibit p. 71.

Group III offenses include “to intentionally deceive, omit information or tell a lie in order to mislead a supervisor”³

On February 27, 2021, Grievant told Sergeant B that Grievant was not alone and Trooper C was with him. Sergeant B asked Grievant why Trooper C was not with him when he identified the stolen vehicle. Grievant said that Trooper C had just pulled out and stopped a vehicle and then seconds later the stolen vehicle passed by. Grievant’s statements to Sergeant B were untruthful. Grievant was alone. Trooper C was not with Grievant when he identified the stolen vehicle. Trooper C was approximately 3.7 miles away at Pughsville Road. Trooper C had not “just pulled out and stopped a vehicle” immediately prior to the stolen vehicle passing by. Grievant knew his statements were untrue. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for intentionally deceiving Sergeant B. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued that he was not untruthful to Sergeant B but rather mistaken as the facts changed over time. The evidence showed Grievant was not truthful to Sergeant B. This conclusion was confirmed based on what Grievant said to Trooper C shortly after his conversation with Sergeant B. Grievant told Trooper C he “kind of blamed it on” her. Grievant told Trooper C “if [Sergeant B] asks you, tell him you were with me.” Trooper C questioned why she would do that. Grievant said because he did not want to get yelled at. Grievant’s statements to Trooper C on February 27, 2021 showed that he knew he had misled Sergeant B during their telephone call. Grievant was attempting to have Trooper C support his statements to Sergeant B that he knew were untrue. Trooper C’s testimony regarding her conversation with Grievant was credible.

Grievant argued that he did not attend the Area Meeting in which the new policy was discussed. He contends that when he met with Sergeant B on February 22, 2021, Sergeant B did not give specifics of where the second trooper had to be when Grievant was using the LPR. Grievant argued that when he said “with [me]” he meant Trooper C was within the general area and not adjacent to him. These assertions fail because if Grievant meant “with me” to mean in the general area, he would not have had any reason to call Trooper C and tell her that “if [Sergeant B] asks you, tell him you were with me.” Grievant would not have had a reason to tell Trooper C that he “kind of blamed it on” her because there would not have been any blame. If Grievant understood “with me” to mean in the general area, he would not have found it necessary to falsely claim that Trooper C “just pulled out” and stopped a vehicle. Grievant was trying to tell Sergeant B that Trooper C was near Grievant when the LPR alerted because she had just pulled out from his location. Since Trooper C was at Pughsville Road, Grievant would not have been able to determine that Trooper C “just pulled out” and stopped a vehicle. Grievant was explaining to Sergeant B that he was not alone immediately prior to observing the stolen vehicle.

³ General Order ADM 12.02(14)(b)(26).

Trooper C had not spoken to Trooper C before the pursuit began. She did not know where he was located. She did not know Grievant was using the LPR. Grievant claimed he saw Trooper C at the beginning of his shift and knew where she would be. Trooper C was not with Grievant participating in Grievant's use of the LPR because she had not spoken while Grievant before he began operating the LPR system.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁴ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. 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 light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal 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.

⁴ Va. Code § 2.2-3005.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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