



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11887

Hearing Date: March 3, 2023
Decision Issued: May 26, 2023

PROCEDURAL HISTORY

On August 25, 2022, Grievant was issued a Group III Written Notice of disciplinary action for making false statements about his location.

On September 1, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 19, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 3, 2023, 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 Senior Trooper at one of its locations. He was employed by the Agency for approximately 11 years.

The Agency operated a Computer Aided Dispatch system to record contact between the Agency's Dispatchers and Senior Troopers. The Agency conducted Roll Calls during each Senior Trooper's shift to determine the Senior Trooper's location and ensure his or her status. Senior Troopers were to report their status using the computers in their vehicles.

The Agency operated out of the Old Office for several years. The Agency's lease of the Old Office expired December 31, 2020. Agency employees began working out of the New Office in December 2020. Agency employees no longer had any reason to go to the Old Office other than for service calls.

On May 6, 2021, Grievant attended an Area staff meeting. During the meeting, the Sergeant instructed staff not to go to the Old Office except for service calls and said that the landlord did not want staff to go to the Old Office.

The Old Office was approximately 3.1 miles from the New Office. A vehicle could travel that distance in approximately 7 minutes.

Grievant began his shift on October 18, 2021 at 10 p.m. and it ended on October 19, 2021 at 6 a.m. Grievant was assigned responsibility to patrol the Interstate.

Grievant drove into the Old Office parking area at approximately 1:15 a.m. on October 19, 2021.

A Roll Call occurred at 1:17 a.m. Grievant indicated he was at "OFFICE." Grievant was actually at the Old Office, not the New Office. The distance between those points was approximately 3.1 miles.

The Sergeant was at the New Office when Grievant indicated he was at the office. The Sergeant looked around the New Office and did not see Grievant's vehicle. The Sergeant accessed the Agency's GPS system to find Grievant's location. Grievant was at the Old Office.

The Sergeant drove his vehicle to the Old Office and parked in the adjacent lot. The Sergeant walked to Grievant's vehicle which was located between the Building and Storage Shed. Grievant's vehicle was "blacked-out" with the front facing L Parkway. Grievant's vehicle was not visible to the road. The Sergeant believed Grievant appeared to be sleeping. The Sergeant moved his vehicle directly behind Grievant's vehicle and activated his marker lights. Grievant did not exit his vehicle or acknowledge the Sergeant's presence. After being behind Grievant's vehicle for a "significant" amount of time, the Sergeant moved his vehicle off to the left of the entranceway in order to observe Grievant. For the next two hours, the Sergeant could only observe Grievant's computer screen light up during roll call and then darken. Grievant's vehicle would remain blacked out until the next roll call.

A Roll Call occurred at 2:19 a.m. Grievant indicated he was at "NB86" meaning he was north bound at mile marker 86. Grievant was at the Old Office. The distance between those points was approximately 1.8 miles.

A Roll Call occurred at 3:24 a.m. Grievant indicated he was at "NB 88 MM" meaning he was north bound at mile marker 88. Grievant was at the Old Office. The distance between those points was approximately 2.2 miles. Grievant testified he meant to type 86, not 88.

A Roll Call occurred at 4:16 a.m. Grievant indicated he was at "OFFICCC." Grievant was at the Old Office, not the New Office. The distance between the points was approximately 3.1 miles.

A Roll Call occurred at 5:16 a.m. Grievant indicated he was at "86 EXIT."

Grievant left the Old Office at approximately 5:36 a.m.

When asked whether he was sleeping while parked at the Old Office, Grievant said, "I cannot confirm nor deny that anybody can doze off but clearly not sleeping on duty."

Grievant told the Agency's Investigator that "when I provided my locations for roll call, it was accurate since I was in the general area of those locations at the given times."

CONCLUSIONS OF POLICY

Unacceptable behavior shall be divided into three types of offenses, according to severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."¹

Group III offenses include behaviors that "illustrate an employee's dishonesty in their job duties."² From approximately 1:15 a.m. to 5:36 a.m. on October 19, 2021, Grievant was not performing his assigned duties except for when he responded to Roll Call. When Grievant responded to Roll Call he said his location was "office" which he knew or should have known that the Agency would believe was the New Office location. He could be performing work duties while at the New Office. Grievant was actually 3.1 miles away at the Old Office, a place where he had been instructed not to go. Grievant falsely represented that he was at the New Office when he was not actually at the New Office. Grievant's actions could reasonably be interpreted as attempting to prevent the Agency from finding out that he was resting instead of performing his patrol duties for over four hours. The Agency has presented sufficient evidence to show that Grievant was dishonest about his location thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant presented evidence that Senior Troopers often answered roll calls by giving only their general locations and not their precise locations. They did so because their communications could be intercepted by the public and if someone intended to do them harm that person could locate the trooper. Grievant asserted that he was used to calling the Old Office the "office". He claimed he answered the roll call with "office" out of force of habit. October 19, 2021 was the first time Grievant went to the Old Office since the Agency began using the New Office. It is difficult for the Hearing Officer to believe that Grievant would confuse the Old and New Office two times after nine months had passed since he had worked at the Old Office. It is more likely that Grievant knew he

¹ See, General Order ADM 12.02, Disciplinary Measures.

² See, General Order ADM 12.02.

should have reported his location as the Old Office but instead reported his location as the New Office to hide that he was not performing his work duties.

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”³ 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.

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.

³ Va. Code § 2.2-3005.

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.