

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management**

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11931**

Hearing Date: May 30, 2023
Decision Issued: June 7, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed effective March 13, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on March 24, 2023 and the Grievance Hearing was scheduled for May 30, 2023, with a copy of all exhibits and list of witnesses to be provided no later than May 23, 2023.

The Grievance Hearing was conducted on May 30, 2023 as scheduled.

The grievance hearing addressed the Written Notice issued on December 15, 2022, citing offense date of November 15, 2022, designating a Group III offense of failure to follow instructions or policy.

At hearing, the Agency Attorney and the Agency Representative stated that the violation consisted of the Grievant operating a state vehicle while under the influence of intoxicating beverages, drugs or other substances in violation of state and agency policy.

The discipline imposed by the Agency was as follows:

- 30-day suspension without pay
- Demotion to Deputy I position
- Disciplinary pay reduction of 20% from current salary
- One (1) year revocation of state vehicle driving privileges
- Re-take DGS Fleet Management Driving Course after 1 year suspension as served (Agency Exhibit 2)

APPEARANCES

Grievant
Grievant's Attorney

Agency Party Designee
Agency's Attorney

ISSUES

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Whether any such violation was a Group III violation under the standards of conduct?
3. Whether the Agency considered mitigating and aggravating factors?
4. Whether the Written Notice was consistent with law and policy?

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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-14, with exception of the Exhibit at Tab 8 which was not admitted into evidence and not considered by the Hearing Officer.

The Grievant's exhibits admitted into evidence are contained in one notebook with tabs A-F. Grievant's Exhibit at Tab A was not admitted into evidence due to the inability of the Agency Attorney or the Hearing Officer having the opportunity to cross-examine any witness regarding the material at Exhibit A. Grievant Exhibit F is a witness statement by a witness who was known to the Agency and to the Grievant but neither party called the witness to testify at hearing.

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 Agency employed Grievant as Assistant State Fire Marshall, Field Operation with such employment governed by the following:

- DHRM Policy 1.05
- Agency Policy 03.00.01 Vehicle Use Policy
- Agency Code of Ethics

The only disputed issue in this grievance is whether the Grievant on November 15, 2022 was under the influence of intoxicating beverages, while operating the state vehicle..

The Agency's first witness testified without objection as an expert witness in the field of toxicology. The witness's curriculum vitae is set out at Agency Exhibit 13.

The toxicologist testified that he reviewed the witness statements which were provided to him (and included as Agency Exhibits) and was advised that the Grievant is five feet six inches tall and weighed 175 pounds (although the Grievant testified that at the time of the alleged offense the Grievant weighed 190 pounds). The toxicologist testified that if the Grievant consumed three twenty-two-ounce beers between 5:30 pm and 8:00 pm and then operated a vehicle at 8:00 pm, that the Grievant would have been impaired and would have been operating the vehicle under the influence of intoxicating beverages. The toxicologist added that the three twenty-two-ounce beers would represent seventy-eight grams of alcohol, resulting in a blood alcohol level of between .11 and .12, with each beer representing .03 to .04 of blood alcohol.

Since the toxicologist did not observe the Grievant consuming alcohol, the Agency's witnesses as to the Grievant's alcohol consumption were as follows:

- A. The first witness was an HR Coordinator who had been with the Agency for one year and only knew the Grievant in passing and held no grudge against the Grievant. The witness testified that the witness arrived at the social gathering at 6:30 and left at 8:00 when the event concluded. The witness testified that the witness had one "small" beer but observed the Grievant drink four twenty-four-ounce beers in their entirety. The witness further testified that the Grievant's drinking caught the witness's attention because the Grievant was drinking quickly.

The witness's written statement recounting the events (Agency Exhibit 5) was written the next day and stated that the witness arrived "around 6:00" (rather than 6:30 as testified to); that [the Grievant] drank "four 24-ounce beers, served by our waitress. He was loud and flirtin with the waitress when she served our table...I left the restaurant at 8:00. When I was at the light at the

intersection in my personal vehicle, I saw [Grievant] driving the state vehicle.”

- B. The Agency’s second witness testified that the witness has been with the Agency since 2017 and that at the time of the alleged offense, the Grievant was the witness’s superior, with whom the witness had a good relationship. The witness testified that the witness was sitting with the Grievant during dinner and testified that the Grievant “probably had three or four” tall or 22-ounce beers. The witness testified the witness was not drinking that night and that everybody left at about the same time at 8:00.
- C. The Agency’s next witness was the Chief State Fire Marshall who has been with the Agency for twelve years. The witness testified that the Grievant is second in command behind the witness.

The Chief testified that the social event was an “all hands” social gathering in connection with a meeting of Agency employees from across the state. The Chief testified that during the event the Chief had three tall beers which the Chief described as being more than sixteen ounces but not more than thirty ounces. The Chief testified that the Chief observed the Grievant have at least three beers.

The Chief’s written statement (Agency Exhibit 7) set out in part “During dinner, I noticed [Grievant] drinking at least 4 tall beers...we all left as a group around 8:00 pm and I saw [Grievant]...at the stoplight...in [Grievant’s] State Vehicle...”

Upon cross-examination the witness testified that the witness did not see if the Grievant consumed all of each beer the Grievant ordered. The Chief further testified that the Chief believes that the Grievant is honest.

- D. The Agency’s final two witnesses were both HR Managers. The first HR Manager testified that before any written notices are issued DHRM is consulted. The second HR Manager testified that the HR Manager approved the Group III Written Notice and associated discipline after reviewing all witness statements and Agency policies and procedures.

The Grievant testified that the Grievant arrived first with three or four other people around 6:00 (whereas his statement dated December 7, 2022, stated that the Grievant arrived “around 5:30 pm” (Agency Exhibit 1) and that after discussing arrangements for the group that would be arriving ordered a tap beer which was “...probably 22-ounces.” The Grievant testified that after a “couple of sips” of the first beer, which the Grievant did not like, the waitress took

the first beer away and brought the Grievant a second beer. The Grievant further described the “couple of sips” as being probably the amount of a shot glass or one and a half shot glasses. The Grievant testified that the second beer was brought to the Grievant probably around 6:15 and that the Grievant drank all of the second beer with the Grievant’s meal of chicken wings. The Grievant testified that at approximately 7:00 the Grievant had finished the Grievant’s meal and ordered a third beer. The Grievant testified that around 7:30 the Grievant stopped drinking the third beer approximately halfway through and started drinking water until the Grievant left at approximately 8:00 because the Grievant knew the Grievant was going to drive and “...wanted to be safe.” The Grievant estimated that the cumulative amount of beer that the Grievant consumed between the time the Grievant arrived and the time the Grievant left at about 8:00 was thirty-six-ounces.

The Grievant also testified that the night in question the Grievant was definitely not impaired and had no problem driving. The Grievant testified that the Grievant always drives the Grievant’s state vehicle and that the Chief had to know that the Grievant was driving the state vehicle that evening. The Grievant testified that the Grievant’s entire career has centered on safety, first while serving four years in military service, many years in fire and rescue and in Grievant’s current position as Assistant Chief.

In addition to the testimony of the Agency witnesses and the testimony of the Grievant, the Hearing Officer took into consideration the following:

- Grievant’s DMV record listing no offenses and with the maximum plus five driver point balance (Grievant Exhibit B)
- Grievant’s memorandum to the State Fire Marshall dated December 7, 2022 which states that in the Grievant’s 35+ years of driving Grievant has never had any alcohol driving infractions nor accidents (Grievant Exhibit D)
- Grievant’s Performance Evaluation dated October 13, 2021 with an overall rating earned of Major Contributor (Grievant Exhibit E)
- Witness statement of the witness not called by either party to testify at the hearing (Grievant Exhibit F) which stated that “I observed [Grievant] drinking from a glass mug throughout [Grievant’s] meal. I witnessed one refill.”
- All of Agency’s Exhibits 1-14 with the exception of Exhibit 8

CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their 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.” (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource Management...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

It is not disputed that the Grievant operated a state vehicle immediately upon leaving the social gathering where the Grievant had consumed alcoholic beverages. The only issue in dispute is whether the Grievant was under the influence of alcoholic beverages at the time the Grievant operated the state vehicle. The toxicologist's opinion was based on the Grievant being five feet six inches tall and weighing 175 pounds and having consumed three twenty-two-ounce beers between 5:30 pm and 8:00 pm which if accurate would have resulted in the Grievant being impaired and therefore operating the state vehicle while under the influence of alcoholic beverages. Only one of the Agency's witnesses, the HR Coordinator, testified both in direct testimony and in rebuttal testimony that the witness observed the Grievant drink all of four

twenty-four-ounce beers. However, the witness testified that the witness did not arrive until 6:30 while the Grievant's un rebutted testimony was that the Grievant's first beer was sent back after a couple of sips and that the Grievant's second beer was brought to the Grievant around 6:15. In addition the witness testified that each of the four beers was a twenty-four-ounce beer rather than the actual twenty-two-ounce beers which were brought to the Grievant.

In addition, after the Grievant testified as to the Grievant's consumption of beer, and estimated that the Grievant had probably consumed thirty-six-ounces over the course of the evening (as opposed to the sixty-six-ounces upon which the toxicologist based the toxicologist conclusion that the Grievant would have been impaired and operating under the influence of alcoholic beverages), the toxicologist was not called as a rebuttal witness to testify as to whether the thirty-six-ounces would have resulted in the Grievant being impaired and operating a vehicle under the influence of alcoholic beverages.

In conclusion, the Hearing Officer cannot conclude that the Grievant lied during the Grievant's sworn testimony, the Grievant having been described by his superior as being honest, and cannot conclude that the witnesses as to his consumption of beer that evening would have recalled with certainty how much of each beer served to the Grievant was actually consumed by the Grievant.

Accordingly, the Hearing Officer concludes that the Agency did not prove by a preponderance of the evidence that the Grievant operated a state vehicle while under the influence of alcoholic beverages.

In reaching the Hearing Officer's conclusions and decision, the Hearing Officer gave consideration to the arguments of both attorneys.

DECISION

For the reasons stated herein, the Agency's Written Notice shall be removed from the Grievant's employee record, the Grievant shall be repaid the withheld pay from the thirty day suspension, the Grievant shall be restored to the Grievant's position as Assistant Chief, the pay reduction shall be removed from the Grievant's salary, the one-year revocation of state vehicle driving privileges shall be removed and the requirement that the Grievant retake DGS Fleet Management Driving Course shall be removed.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: _____
Date

John R. Hooe, III
Hearing Officer

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