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. 11957

Hearing Date: June 6, 2023
Decision Issued: June 15, 2023

PROCEDURAL HISTORY

On September 1, 2022, Grievant was issued a Group III Written Notice of disciplinary action, without suspension or termination. The offense was falsifying records.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 12, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On June 6, 2023, a hearing was held in person at the Agency's off-site facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant would have only offered duplicate documents, so he did not submit separate exhibits. Following the hearing, both sides were permitted to file post-hearing authorities on the issue of "gross negligence" by June 12, 2023, however, neither side submitted authorities and the record closed June 12, 2023. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Counsel 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."

The Agency's Operating Procedure 135.1, *Standards of Conduct*, provides that a Group III offense includes acts and behavior of such a serious nature that a first occurrence normally should warrant termination. Agency Exh. 11, p. 207. Group III offenses include, among other things:

> Falsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports statements, insurance claims, time records, leave records, or other official state documents.

Agency Exh. 11, p. 207.

The Offense

The Group III Written Notice, issued by the Agency's facility superintendent on September 1, 2022, detailed the facts of the offense, and concluded:

> Violation of Operating Procedure 135.1 Standards of Conduct. During an investigation into an incident occurring on 1/18/22, in which CO[E] and Inmate [D] each accusing the other of assault, it was discovered [Grievant] falsified information in his report even after reviewing the video. This is [a] violation of OP 135.1 which states in part, "Falsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generate in the regular and ordinary course of business, such as count sheets, vouchers, report statements, insurance claims, time records, leave records, or other official state documents", is an incident of serious nature. Therefore, this Group III is being issued.

Agency Exh. 1. While not stated on the Written Notice itself, the Agency found that the Grievant's long meritorious service and lack of active Written Notices mitigated against suspension, demotion or termination.

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 captain, with 21 years with the Agency, and as the shift supervisor the Grievant had responsibility for writing the facility's official incident report regarding the altercation referenced in the Written Notice. The incident was captured indoors by institutional video cameras from two angles. Agency Exh. 12 and 13. The involved corrections officer reported that the inmate was the aggressor and physically assaulted the officer. The Grievant reviewed video from only one camera angle of the commencement of the incident, and he wrote the incident report to reflect the officer's version that the inmate was the aggressor. The video evidence does not record sound, but it clearly shows that the corrections officer was the aggressor during the altercation, shoving the inmate forcefully enough to knock him off his feet and sliding across the floor. The Grievant testified that, while he had questions regarding the corrections officer's account, the Grievant's incident report omitted this key information regarding the corrections officer's aggressive behavior. *See* Grievant's Incident Report, Agency Exh. 9, p. 132.

The Agency's special investigator testified regarding his interviews and conclusions that the Grievant had falsified his incident report, having information readily available beyond solely the corrections officer's account. The Agency's facility superintendent testified consistently with the Written Notice, stressing that the Agency's reports must be accurate and complete, as there is no systemic authority to correct such a report later. The Grievant admitted that his incident report omitted key information, but he asserted that he lacked training, followed advice from his major about what to include in the incident report, and that he did not willfully falsify the document.

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, I find that the Agency has reasonably proved the misconduct of the Group III Written Notice.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice. The Grievant's defense that he was not well-trained rings rather hollow for such a long-term employee of the Agency and the sensitive nature of an altercation between an inmate and corrections officer and the serious implications of his incident report. The Agency conceded that the Grievant may not have willfully falsified the document, but it relied on the Grievant's "gross negligence" in his reporting.

Operating Procedure 135.1 does not provide a general definition of gross negligence. Under Virginia case law, gross negligence "requires a degree of negligence that would shock fair-minded persons." *Elliott v. Carter*, 292 Va. 618, 622 (2016) (quoting *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 487 (2004)). By definition, it is "the absence of slight diligence or the want of even scant care." *Cromartie v. Billings*, 298 Va. 284, 297 (2020).

The Grievant's evidence and testimony establishes the essential facts of the offense. By not even viewing the second camera angle video, omitting the obvious fact that the corrections officer was the aggressor shown on the video, the Grievant's negligence shocks fair-minded persons and lacks even scant care. The offense falls squarely within the scope of a Group III Written Notice as a severe violation of policy and trust. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group III Written Notice. The Agency conceivably could have imposed lesser discipline, but its election for a Group III Written Notice, without further penalty, is within its discretion to impose progressive discipline.

Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules,* § VI.B.1.

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.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that the violation was already mitigated to a Group III without suspension, demotion or termination.

Given the nature of the Written Notice, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline. The Agency has proved (i) the employee engaged in the behavior described in the written notices, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of a Group III Written Notice must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

Termination is the normal disciplinary action for a Group III Written Notice. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. There is no evidence of another situation or similar offense treated differently. This was not a situation outside the Grievant's control. Here, given the inherent level of trust incumbent with the Grievant's position as a reporting captain, the nature of the offense has implications of aggravating circumstances.

The Grievant had a long tenure with the agency and had a record of satisfactory work performance. Regardless, under the *Rules*, however, an employee's length of service and satisfactory work performance, standing alone, are not sufficient for a hearing officer to mitigate disciplinary action. *Thus, the hearing officer lacks authority to reduce the discipline on these*

bases. On the issue of mitigation, the Grievant bears the burden of proof, and he lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

Under the EDR's Hearing Rules, the hearing officer must give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the extent of the disciplinary action. In light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice, without job termination, 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.

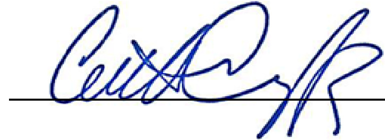
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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]

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

[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