



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11873**

Hearing Date: December 2, 2022  
Decision Issued: January 31, 2023

**PROCEDURAL HISTORY**

Grievant sought to be promoted from Trooper II to Senior Trooper. The Agency denied his request. On March 3, 2022, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 18, 2022, the Office of Employment Dispute Resolution issued Ruling 2022-5407 qualifying the grievance for hearing. On August 9, 2022, the Office of Employment Dispute Resolution issued Ruling 2023-5438. On December 2, 2022, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant's medical condition prevented him from complying with the Agency's weight requirements?

2. Whether the Agency misapplied or unfairly applied its Career Progression policy by deeming Grievant ineligible.

3. Whether exemption from the weight requirements would be a reasonable accommodation to allow Grievant to follow the standard career progression for his position or, alternatively, whether it would unduly burden Agency operations.

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. 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 employs Grievant as a Senior Trooper. He began working for the Agency on October 10, 2012. On February 9, 2022, Grievant was a Trooper II and the Agency declined to advance Grievant to the position of Senior Trooper on February 10, 2022 because he did not meet the Agency’s weight requirement. He was ultimately able to meet the Agency’s weight requirement and became a Senior Trooper effective August 10, 2022.

Grievant is approximately 32 years old. He stands 71 inches tall.

Grievant testified he had metabolic syndrome, high blood pressure, high cholesterol, and obstructive sleep apnea (OSA).

The Agency had a Career Progression Program, “designed to identify those non-supervisory sworn employees to be considered for movement to higher levels (senior trooper, master trooper, and senior special agent).”<sup>1</sup> Consideration for movement to Senior Trooper was based on several criteria including “[w]eight control.”<sup>2</sup>

The Agency established a Weight Control Program for sworn employees. Under the Agency’s Weight Control Program, employees seeking promotion participated in a Physical Survey where their weight was taken and recorded by the Weight Supervisor. If

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<sup>1</sup> Agency Exhibit p. 96.

<sup>2</sup> Agency Exhibit p 96.

employees weighed less than the allowed weight, the employees could advance to a higher position.

An employee had two methods to establish that the employee met the requirements of the Weight Control Program – “chart weight” and “girthed.” The Agency conducts annual, physical surveys of its sworn employees during which they were weighed. The Agency had a chart specifying the maximum allowable weight depending on the employee’s height. If an employee’s weight exceeded the weight allowed by the chart, the employee could ask to be “girthed.” Under this method, a male employee’s neck and abdomen were measured to determine the allowable weight. If an employee’s actual weight was lower than the maximum allowed girth weight, then the employee met the Weight Control Program requirement.

Dr. V was a physician selected by the Agency to assist its employees with medical conditions. He was involved in the Agency’s Weight Control Program. He was the Agency’s Contractor physician.

Grievant wanted to be promoted to Senior Trooper, but felt he would be unable to comply with the Agency’s weight restrictions. The Agency referred Grievant to Dr. V for evaluation.

On June 29, 2021, Grievant met with a Nurse Practitioner working with Dr. V.

On July 6, 2021, the Agency received the results of the evaluation. The Agency understood that Dr. V had advised that Grievant wanted to lose weight to mitigate his health conditions. As a result of the evaluation, the Agency determined that Grievant was exempt from the Agency’s weight control requirements.

Grievant presented the Agency with a note dated July 13, 2021 from Grievant’s physician indicating that Grievant was being treated for metabolic syndrome, hyperlipidemia, and hypertension.

Grievant had an appointment on July 19, 2021 with Dr. V. On July 20, 2021, Dr. V completed a Weight Compliance Examination form indicating that Grievant was not exempt from the Agency’s weight control requirements.

On July 22, 2021, Grievant applied for a Special Agent and Trooper position.

On July 26, 2021, Captain K sent Grievant a memorandum informing him that Dr. V had “rescinded his original determination” and that Grievant was required to be in compliance with the Department’s Weight Control Policy.

On September 27, 2021, Grievant met with Dr. V. Grievant told Dr. V he was meeting with a nutritionist monthly and had adopted a low-fat/low-carb diet. Grievant told Dr. V that Grievant had been diagnosed with OSA and would begin using a CPAP

machine when it arrived. Dr. V described Grievant's diagnoses as HTN, Metabolic syndrome, hyperlipidemia, and OSA. Grievant weighed 296 lbs.

On December 8, 2021, Grievant met with Dr. V. The purpose of the visit was for Dr. V to determine whether Grievant would be exempt from the Agency's Weight Control Program. Grievant weighed 273 lbs. Dr. V was pleased that Grievant had lost over twenty pounds since his last visit. Dr. V and Grievant talked about a temporary exemption from the Agency's weight control policy because Grievant had been working hard to lose weight. Dr. V circled "EXEMPT" on the Weight Compliance Examination form. The form stated:

Exempt – Employee will not be required to meet Department Weight Control requirements for promotion, competitive transfer, and competitive voluntary demotion opportunities applied for, as excess weight is due to medical reasons, as determined by the Department Physician.<sup>3</sup>

Grievant scheduled a follow-up visit with Dr. V for three months later.

On January 19, 2022, Grievant attended the Physical Survey at the Agency's location. He weighed 281 lbs.

On January 25, 2022, the Personnel Analyst sent Grievant an email advising, "you are eligible for career progression to the rank of Senior Trooper for the February 10, 2022 cycle. \*\*\* Should you not be in compliance with the Weight Control Program, you will not be selected for career progression to the rank of Senior Trooper at this time."<sup>4</sup> Grievant interpreted this email to mean that he would progress to the rank of Senior Trooper because Dr. V had exempted him from the Agency's weight control requirements.

On February 3, 2022, the Agency's Nurse Practitioner sent the Agency's policy governing the weight control program to Dr. V. Dr. V completed another Weight Compliance Examination Form for Grievant's appointment on December 8, 2021. Dr. V circled "NON-EXEMPT." The Form stated:

Non-Exempt – Employee will be required to meet Department Weight Control requirements for promotion, competitive transfer, and competitive voluntary demotion opportunities applied for, as excess weight is due to medical reasons, as determined by the Department Physician.

Dr. V signed the form and dated it February 3, 2022. He wrote, "revised from the 12-8-2021 visit" and then wrote his initials.

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<sup>3</sup> Agency Exhibit p 76.

<sup>4</sup> Agency Exhibit p. 78.

On February 7, 2022, Grievant attended the Physical Survey. The Weighing Supervisor determined Grievant weighed 280 lbs. Under the weight control program, the Maximum Chart Weight for Grievant's height was 206 lbs. Since Grievant did not meet the Maximum Chart Weight, he elected to be girthed. Grievant's girth weight could not exceed 251 lbs. Because his weight exceeded 251 lbs. the Agency considered Grievant not to be eligible for Career Progression and did not promote him to the position of Senior Trooper.

If on February 10, 2022 Grievant had met the requirements of the Weight Control Program, he would have been promoted from Trooper II to Senior Trooper and received an increase in salary.

On July 15, 2022, Grievant was made aware of a Career Progression opportunity for the August 10, 2022 cycle. Grievant reported to the Division Headquarters. He weighed 250 lbs. which was one pound below the maximum girth weight to be eligible for Career Progression. The Weighing Supervisor signed the "Weight Compliance for Promotion/Voluntary Transfer or Demotion" form and checked the box indicating, "Employee had maximum allowable girth weight established during Physical Survey."<sup>5</sup> Grievant testified that in order to meet the weight requirement, he acted against the advice of his doctor and altered his diet and reduced his consumption of water. He asserted that he continues to require a medical accommodation to meet the weight requirement.

Grievant was promoted to Senior Trooper on August 10, 2022. Because of the promotion, Grievant's annual compensation increased by several thousand dollars.

## **CONCLUSIONS OF POLICY**

General Order ADM 14.11 governs Physicals and Annual Surveys. This policy requires sworn employees to "undergo an annual survey, which will consist of an accurate check of the following: height, weight ...."<sup>6</sup> The purpose of the survey was "to assure that all sworn employee are healthy and physically fit to fulfill their responsibility of protecting the public."<sup>7</sup> The survey was to be conducted at the employee's Division Headquarters in January of each year. The survey results were to be recorded in the Physical Survey Record.

Maximum allowable weight could be determined by "chart weight" or "girthing." The maximum allowable "chart weight" for a 32 year old male who was 71 inches tall was 206 lbs. "A sworn employee exceeding the weight table at the annual physical survey may request to have his/her maximum allowable weight determined using the girth method."<sup>8</sup>

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<sup>5</sup> Agency Exhibit p. 94.

<sup>6</sup> Agency Exhibit p. 140.

<sup>7</sup> Agency Exhibit p. 141.

<sup>8</sup> Agency Exhibit p. 142.

Under the girth method, a male employee's abdomen and neck were measured to determine the appropriate maximum allowable weight. The Agency determined that Grievant's maximum allowable girth weight was 251 lbs.

The date to determine whether Grievant could advance to Senior Trooper was February 10, 2022. On February 7, 2022, Grievant weighed 280 lbs. His weight exceeded the maximum allowable girth weight. Grievant was not eligible under the Agency's policies to advance to Senior Trooper. The Agency correctly denied Grievant's request to become a Senior Trooper. The Agency did not misapply or unfairly apply its weight control policy.

Grievant argued that he had an exemption from the weight lost restriction and should have advanced to Senior Trooper on February 10, 2022. Grievant argued that Dr. V's revocation of the exemption was not consistent with policy. Dr. V testified that he granted Grievant an exemption on December 6, 2021 because he was encouraged by Grievant's progress and wanted to give Grievant another three months to allow for further weight loss. He admitted his decision was a mistake and based on his misunderstanding of the Agency's policy. He learned how to correctly interpret the Agency's policy from the Agency's Nurse Practitioner. Dr. V learned from her that he could not grant a temporary exemption from the restriction as he had done in Grievant's case. Once he realized he made a mistake, he corrected the mistake and did so before February 10, 2022. Dr. V's revocation of the exemption was not contrary to policy.

Grievant argued that the Agency's Nurse Practitioner was not to be involved in determinations under the Agency's policy. On February 3, 2022, the Nurse Practitioner sent the Agency's policy to Dr. V and discussed the policy with him. This resulted in Dr. V changing his decision to exempt Grievant from the weight control requirement. The Hearing Officer cannot conclude that the Agency acted contrary to policy by making sure that Dr. V was aware of the Agency's policy and how it was interpreted by the Agency. The evidence is clear that Dr. V made an independent decision that Grievant did not qualify for exemption from the weight control requirement. Dr. V had the authority to reverse his initial decision and did so according to policy. The decision to reverse the exemption was not made by the Agency's Nurse Practitioner.

General Order ADM 14.12 sets forth the Agency's Weight Control Policy. Under this policy:

Sworn employees who feel their inability to comply with the Department's weight requirement is due to a medical condition must request a referral for an evaluation by the Department Physician and must provide medical documentation of the condition to the Department Physician.<sup>9</sup>

Grievant argued that he has a medical diagnosis that "impact[s] his ability to lose

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<sup>9</sup> Agency Exhibit p. 147.

weight,” which he discussed with Dr. V and then with management during the grievance resolution steps. To be exempt from the Agency’s weight control requirements, Grievant had to demonstrate that his medical condition prevented him from weighing less than the maximum allowable weight limit. Grievant argued that his medical condition required an accommodation that included being exempt from the Agency’s weight requirements.

Grievant had four medical conditions – hypertension, metabolic syndrome, hyperlipidemia, and OSA. The Nurse Practitioner testified that hypertension did not necessarily affect a person’s ability to lose weight. The Nurse Practitioner testified that metabolic syndrome is a grouping of conditions which can be caused by being overweight and having metabolic syndrome does not necessarily prevent someone from losing weight. Dr. V testified that having metabolic syndrome does not stop someone from losing weight. Dr. V and the Nurse Practitioner testified that hyperlipidemia does not reduce a person’s ability to lose weight. The Nurse Practitioner testified that OSA could affect someone’s ability to lose weight. Dr. V testified that OSA would not affect someone’s ability to lose weight especially when the person uses a CPAP machine. Dr. V testified that Grievant’s medical conditions did not qualify Grievant for an exemption under the Agency’s weight control policy. He testified that Grievant was not overweight because of his medical conditions but rather that being overweight caused his medical conditions. Based on the evidence presented, the Hearing Officer does not believe that Grievant’s medical conditions prohibit him from losing weight to the extent he would be entitled to an exemption from the Agency’s weight requirement. It was not unreasonable for the Agency to expect Grievant to meet the weight requirements even after learning of his medical conditions.

Based on the evidence presented, the Hearing Officer cannot conclude that Grievant is a qualified employee with a disability for which the Agency must make reasonable accommodation by exempting him from the weight requirement. It appears that Grievant can meet the weight requirement because he did so effective August 10, 2022. Grievant should not receive an exemption from the weight loss requirement as an accommodation to his medical condition.

## **DECISION**

For the reasons stated herein, Grievant’s request for relief is **denied**.

## **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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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