



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11847 / 11848 / 11849

Hearing Date: October 31, 2022
Decision Issued: November 21, 2022

PROCEDURAL HISTORY

On March 25, 2022, Grievant was issued a Group I Written Notice of disciplinary action for misuse of State property. On April 21, 2022, Grievant was issued a Group II Written Notice of disciplinary action for insubordination. On May 11, 2022, Grievant was issued a Group I Written Notice of disciplinary action for unauthorized use of State property.

Grievant timely filed grievances to challenge the Agency's actions. On June 9, 2022, the Office of Employment Dispute Resolution issued Ruling 2022-5419 consolidating the grievances for hearing. On June 27, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 31, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 employs Grievant as a Senior Special Agent in one of its Divisions. Grievant has been employed by the Agency for approximately 27 years. He consistently received favorable performance evaluations with ratings of "Major Contributor." No evidence of prior active disciplinary action was introduced during the hearing.

In 2018, Grievant was "greenlit" by a local Gang.¹ This meant gang members intended to behave violently towards Grievant. Grievant learned from an Informant that he had been greenlit. The Informant was deported later and then killed by the gang for testifying against the gang. Once Grievant was greenlit by the gang, that threat did not end. Gangs rarely remove greenlit threats.

¹ Another person who often worked with Grievant was also greenlit.

Because Grievant was greenlit, the Agency placed cameras and alarms at Grievant's Residence to allow him to monitor anyone approaching his home or altering his vehicles including his Department-issued vehicle. The Dispatch Center placed Grievant's Residence on a watch list and if there was a call regarding that address, there would be an elevated response under a gang threat protocol. After several months, the Agency removed the cameras and alarms. Grievant continued to be concerned for his safety so he purchased and installed his own cameras and alarms. He could monitor his cameras remotely.

Grievant and his Wife were in the process of divorcing and were in conflict. In August 2021, they were living in the same Residence.

Grievant's Residence was in a subdivision and consisted of a house with a garage and straight driveway connecting to a public road. When looking from the house to the road, the driveway was two or three car lengths long and two car lengths wide. In other words, two vehicles could be parked in the driveway side by side without encroaching on the road. The road was perpendicular to the driveway. Grievant placed at least one camera outside the Residence that enabled him to view the driveway and the public road in front of the driveway.

Grievant routinely parked his Department-issued vehicles at the front of his driveway in a manner blocking the driveway. Grievant had been assigned a Department-issued unmarked Chevrolet Malibu to use for his work duties. He had been driving the vehicle for about a week. Grievant was allowed to drive the vehicle to and from exercising at a gym.

On August 8, 2021, Grievant had parked his Department-issued vehicle in front of his driveway.² He parked the vehicle in a manner that would block another vehicle from driving into the driveway if the driveway did not have any vehicles parked in the driveway. Grievant had parked his minivan at an angle in the driveway.

On August 8, 2021, the Wife called the Local Police Department and complained there was an unfamiliar vehicle parked in front of her driveway and she was not able to use her driveway.³ An employee of the Local Police Department contacted the Agency's Dispatcher who contacted Lieutenant K. Lieutenant K called the local Police Department's First Sergeant who explained the Wife called and said she was not familiar with the vehicle and wanted it removed. The Local Police Department's First Sergeant said he realize the vehicle was a State Police vehicle and he did not feel comfortable removing the vehicle and would rather have the Agency handle the matter. Lieutenant K went to the Residence and observed the Department-issued vehicle parked on the public road crossing in front of the driveway to the Residence.

² His vehicle did not block the mailbox in front of his Residence.

³ Grievant believed the Wife was attempting to get him in trouble and knew the vehicle was his Department-issued vehicle. He testified that she had observed him detailing the vehicle in the driveway.

Lieutenant K called Grievant. Grievant said this was another attempt by the Wife to get him in trouble. Grievant sent Lieutenant K a photo from his surveillance camera showing how his vehicles were parked. Lieutenant K asked Grievant to move the vehicle. Grievant was not in the area and could not move the vehicle immediately.

Lieutenant K asked Sergeant H to have the State vehicle towed to the local State Police office. The cost to tow the vehicle was \$215.⁴ The Local Police Department did not issue Grievant a citation for illegally parking the vehicle.

On Monday August 9, 2021, Grievant met with Lieutenant K and First Sergeant E to discuss the incident. Lieutenant K advised Grievant that the Agency was handling the incident administratively and not criminally. Lieutenant K told Grievant “not to park his Department-issued vehicle in front of his driveway or any other driveway.” Grievant asked Lieutenant K what policy he violated but did not ask Lieutenant K for clarification of his instruction. Grievant did not mention his concerns about his safety.

During the August 9, 2021 meeting with Grievant, Lieutenant K told Grievant that the Captain was planning on meeting with him in the next few days. The meeting did not take place.

The Wife’s attorney sent text messages to an Agency employee with photos of Grievant’s Department-issued vehicle parked in front of Grievant’s driveway.

From August 26, 2021 to October 14, 2021, Sergeant D of the Office of Internal Affairs conducted surveillance of Grievant’s home and observed Grievant’s Department-issued vehicle parked in front of Grievant’s driveway sixteen times. The vehicle was parked in a manner to prevent entry and exit of a vehicle into the driveway.

On October 6, 2021⁵, Grievant took annual leave to attend a court hearing regarding a legal proceeding involving the Wife. Grievant was not working in his capacity as an Agency employee. He was a party to the court proceeding. Grievant drove his Department-issued vehicle to the courthouse and parked in a “Police Vehicle Only” parking space. No evidence was presented showing Grievant worked in official capacity while at the courthouse. The Wife spoke with First Sergeant D and told him that Grievant had brought his Department-issued vehicle to the courthouse. The Wife’s Attorney sent First Sergeant D a text message stating sarcastically, “I’d like to get a VSP cruiser on my days off.”⁶

On October 8, 2021, the local Juvenile and Domestic Relations Court entered an order requiring Grievant and the Wife to share the driveway of the Residence.

⁴ Lieutenant K instructed Grievant to pay the tow bill with an Agency issued credit card.

⁵ The date may have been October 7, 2021.

⁶ Agency Exhibit p. 396.

On February 2022, Grievant sold his shared Residence and moved to another location.

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.”⁷

March 25, 2022 Group I Written Notice

The Agency alleged Grievant parked his Department-issued vehicle in front of his driveway contrary to Va. Code § 46.2-1239 and local ordinance §13-320.

Va. Code § 46.2-1239 provides:

No person shall park a vehicle or permit it to stand, whether attended or unattended, on a highway in front of a private driveway, within 15 feet of a fire hydrant or the entrance to a fire station, within 15 feet of the entrance to a plainly designated emergency medical services agency, or within 20 feet from the intersection of curb lines or, if none, then within 15 feet of the intersection of property lines at any highway intersection.

Local Ordinance §13-320 provides:

No person shall park a vehicle, except when necessary to avoid other traffic or in compliance with the directions of a police officer or traffic control device, in any of the following places: ***

In front of a public or private driveway.

The Agency has not established a basis for issuance of the March 25, 2021 Group I Written Notice for several reasons. First, Grievant argued that the State statute and local ordinance applied only to situations where a person parked a vehicle in front of someone else’s driveway. In this case, Grievant was parking a vehicle in front of his own driveway. Grievant presented credible testimony from a former local prosecutor who indicated that the State statute and local ordinance had never been enforce against a homeowner who had parked a vehicle in front of his own home. Second, Grievant’s driveway was not a public road and he was entitled to control who entered driveway just as he was entitled

⁷ See, General Order ADM 12.02, Disciplinary Measures.

to control where he parked his vehicles in his driveway. Third, Grievant had been parking his Department-issued vehicle at the end of his driveway for many years. His objective was to ensure the Department-issued vehicle was within the view of the cameras he installed at the front of his house. His actions were in furtherance of his safety. Fourth, Grievant did not believe parking the Malibu at the end of his driveway was a violation of any law. Fifth, the Wife's complaint appears to be an attempt to undermine Grievant rather than a genuine complaint about an unknown vehicle parked in front of the Wife's driveway blocking her access.⁸ The March 25, 2021 Group I Written Notice must be reversed.

April 21, 2022 Group II Written Notice

General Order ADM 11.00(2)(a) provides, "[e]mployees will obey any lawful order of a supervisor, including any order relayed from a supervisor by the employee of the same or lesser rank." General Order ADM 11.00(2)(b) provides, "[e]mployees shall also comply with written and verbal instructions from a supervisor." General Order ADM 11.00(2)(c) provides violations of the Standards of Conduct include, "[w]illful disobedience of a lawful command of a supervisor" and "[f]ailure to follow a supervisor's instructions."

Group II offenses include, "[f]ailure to follow a supervisor's instructions."⁹ On August 9, 2021, Lieutenant K told Grievant "not to park his Department-issued vehicle in front of his driveway or any other driveway." Grievant understood Lieutenant K's order. He did not seek clarification of the order. Grievant disregarded that instruction and continued to park his Department-issued vehicle in front of his driveway. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued he asked Lieutenant K what policy he violated but did not receive an answer. Lieutenant K's order did not need to be in furtherance of a policy or law in order to be binding on Grievant.

Grievant argued that he was not able to comply with Lieutenant K's order because doing so put his life at risk. This argument is not persuasive because Grievant could have parked the Department-issued vehicle in the driveway and his personal vehicle at the end of the driveway.

May 11, 2022 Group I Written Notice

General Order ADM 3.11(1) provides that "[t]he use of a state-owned and state-leased automobile shall be limited to official state business."

⁸ A Guardian Ad Litem filed a Motion containing a footnote stating that the Wife admitted to a Guardian Ad Litem that she had responded to some of Grievant's behavior in a "tit for tat" manner. See, Agency Exhibit 387. Grievant presented a picture showing the Wife parking her vehicle at the end of the driveway partially blocking the driveway.

⁹ See, General Order ADM 12.02, Attachment A.

General Order ADM 11.00(d)(6) provides that “[u]nauthorized use or misuse of state property” is a violation of the Standards of Conduct.

Group I offenses include, “unsatisfactory job performance.”¹⁰ On October 6, 2021, Grievant drove his Department-issued vehicle to the Courthouse to attend a hearing involving a personal dispute. He was not acting in his capacity as a Virginia State Police employee. He did not drive the vehicle to the Courthouse as part of “official state business.” Grievant’s behavior was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that he was obligated to appear in court when subpoenaed as witnesses. Grievant, however, was not a witness when he appeared in court. He was a party.

Grievant argued that he intended to work out after court and, thus, his trip was with his job duties. The evidence showed that Grievant did not take a direct path to the gym to work out. At least some portion of his trip was not for official business. The Agency has presented sufficient evidence to justify its decision to take disciplinary action.

Mitigation

*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”¹¹ 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 further the disciplinary actions.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a March 25, 2021 Group I Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of an April 21, 2022 Group II Written Notice of disciplinary action

¹⁰ See, General Order ADM 12.02, Attachment A.

¹¹ Va. Code § 2.2-3005.

is **upheld**. The Agency's issuance to the Grievant of a May 11, 2022 Group I Written Notice of disciplinary action 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]

[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.