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. 11964

Hearing Date: July 28, 2023
Decision Issued: July 31, 2023

PROCEDURAL HISTORY

On February 6, 2023, Grievant was issued a Group II Written Notice of disciplinary action, with no other sanction. The offense was failure to follow instructions or policy on October 11, 2022.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 8, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On July 28, 2023, a hearing was held in person at the Agency's location, the first mutual date available for the parties.

Both the Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Counsel for Grievant
Agency Representative
Advocate 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 General Order OPR 6.05, Videographic Evidence, states:

1. The use of in-car video units in law enforcement provides a potentially valuable resource for law enforcement agencies in the delivery of services. Information collected through this technology can be critical in the investigation of criminal incidents and complaints against employees.
2. …. Recordings from in-car video units may also be used to aid in determining facts during administrative investigations. …
   …
5. The in-car video unit will be used for:
   a. All traffic and criminal enforcement stops and all vehicle searches.
   …
   c. Field interviews, interrogations or tests. (e.g., pedestrians, DUI, etc.)
   d. Patrol vehicle operation and movements when emergency lights and/or siren are used.
   …

Agency Exh. 3.

General Order ADM 11.00, Standards of Conduct, requires employees to:

- Employees will comply with all written directives, to include Department manuals, informational bulletins, and memoranda. Employees shall also comply with written and verbal instructions from a supervisor.

Agency Exh. 6.

A Group II offense includes acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action. Expressed examples include failure to follow a supervisor's instructions and policy violations. General Order ADM 12.02, *Disciplinary Measures*. Agency Exh. 7.

The Offense

The Group II Written Notice, issued by Captain S. on February 6, 2023, detailed the facts of the offense, and concluded:

> On October 11, 2022, you failed to turn on your in-car video unit until approximately 18 minutes after you initiated a traffic stop, involving Mr. [J], which ultimately resulted in a use of force. This failure is a violation of General Order OPR 6.05, paragraph 5 and a failure to follow written supervisor instructions issued to you on May 18, 2020 by, then, Captain [M] wherein he specifically directs you to do the following.
>
> > " ... comply with all supervisor instructions and established written policy. As it relates to videographic evidence and use of the in-car video unit, you are specifically advised to comply with all related training, memorandums, bulletins, and all policy and instructions set forth in General Order OPR 6.05 of the State Police Manual."
>
> Your failure here is a violation of the Standards of Conduct, specifically as it pertains to compliance with Orders and Written Directives itemized in General Order ADM 11.00, paragraph 2 c. (3), of the State Police Manual, which prohibits the "[f]ailure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."

Agency Un-numbered Exh. For circumstances considered, the Written Notice stated:

> Pursuant to and in accordance with General Order ADM 12.02, paragraph 6 b, of the State Police Manual, this misconduct warrants the issuance of a Group II Written Notice. Also in accordance with General Order ADM 12.02, paragraph 6 b; of the State Police Manual, because you were subject to a previous SUSTAINED finding on May 18, 2020 for the same behavior and because your behavior directly contravenes Captain [M]'s previous orders to you in regards to complying with supervisor's instructions and .established written policy, there will be no mitigation in corrective action here and you are being issued a Group II Written Notice.

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 motor carrier safety trooper for some years, with the prior counseling of May 18, 2020, being the only other discipline of record. The most recent performance evaluation rated the Grievant as a major contributor, consistent with prior years' evaluations. The Grievant's main duty is performing commercial motor safety inspections.

On May 18, 2020, written counseling was issued to the Grievant, following investigation of four allegations that involved the Grievant's failure to utilize his in-car video camera to record the interactions. The Counseling Memorandum mitigated what could have been a Group II Written Notice for failing to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy. The Grievant was directed

> to comply with all supervisor instructions and established written policy. As it relates to videographic evidence and use of the in-car video unit, you are specifically advised to comply with all related training, memorandums, bulletins, and all policy and instructions set forth in General Order OPR 6.05 of the State Police Manual.

Captain (now Major) M. testified that because of an unusual number of complaints involving the Grievant's conduct with drivers, he decided to have an in-car camera installed in the Grievant's assigned motor carrier unit vehicle. This step had also been taken with other motor carrier unit troopers. The complaints were mostly held to be unfounded because of the lack of any other witnesses or video. Captain M.'s memorandum of April 2, 2019, memorializes this decision. Agency Exh. 1. Typically, motor carrier unit vehicles do not have in-car cameras. Captain M. also testified to the May 18, 2020, counseling memorandum referenced in the Group II Written Notice. He also testified to his belief that the motor vehicle safety inspection is considered a policy event for in-car camera use, but, regardless, the field interview aspect of the motor vehicle safety inspection is an express basis in OPR 6.05, at ¶ 5.c., for the use of the in-car camera

Sergeant V. supervises the Grievant's motor carrier safety unit, and he testified that his administrative investigation of the October 11, 2022, incident confirmed that the Grievant had utilized his emergency lights during the inspection stop. This is a basis under policy to use the in-car camera, as well as the field interview required for the safety inspection. While there is a distinction between a traffic stop and a motor carrier inspection, the criteria for use of the in-car camera existed for this incident.

Captain S., division commander for the safety division, testified to his issuance of the Group II Written Notice to the Grievant. Captain S. testified that the Grievant's failure to use his in-car camera for the October 11, 2022, incident was contrary to policy and supervisor's specific instructions. He testified to consideration of mitigation, but the prior counseling and the repeat nature of the Grievant's failure was not outweighed by the Grievant's tenure and otherwise good work record. Captain S. also confirmed that the field interview required for safety inspections is an expressed reason for use of the in-car camera, regardless of whether such an inspection is a traffic stop.

Trooper W. testified that a safety inspection, alone, is not considered a traffic stop. Trooper Y., a training instructor for the motor safety inspection unit, testified that OPR 6.05 is not covered in training, but, as a part of a safety inspection, there is a field interview.

The Grievant testified that his emergency lights were activated and his camera, although functional, was not turned on. The Grievant further testified in detail to the incident on October 11, 2022, in which the driver of the vehicle surprisingly assaulted the Grievant. He testified that his safety inspection was not a traffic stop, and that is why he did not engage his in-car camera. His understanding of the policy directive is that the in-car camera is for use only during traffic or criminal enforcement stops, pursuant to OPR 6.05, ¶ 5.a.

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 II Written Notice.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice. The Grievant asserts a policy defense to the requirement to have his in-car video

camera operating for merely a safety inspection. The Grievant, however, strains the policy to fit his circumstances. In the facts of the incident on October 11, 2022, the evidence clearly establishes that the Grievant necessarily utilizes a "field interview" of the driver for every commercial motor vehicle safety inspection. Field interviews are specifically enumerated as instances for use of the in-car camera. OPR 6.05, ¶ 5.c. Additionally, the testimony established that the Grievant had his emergency lights on during this inspection stop—another enumerated instance of using the in-car camera. OPR 6.05, ¶ 5.d. Focusing only on traffic and criminal enforcement stops under OPR 6.05, ¶ 5.a., the argument tries to obscure the fact that this Grievant was specifically assigned to use an in-car camera because of his past experience with driver interactions. The Agency put the Grievant on notice of its exacting expectations with its counseling memorandum of May 18, 2020.

This Grievant was an exception to the practice of not having in-car cameras in most vehicles of the motor vehicle safety unit. The Agency, because of interaction experience with this Grievant, specifically wanted the camera in use for this Grievant—a fact the Grievant complained of in his grievance. If the policy were construed to exclude all commercial motor vehicle safety inspections, this Grievant would rarely use the in-car camera because his main duties are focused on commercial motor vehicle safety inspections. This narrow interpretation by the Grievant strains the very reason, known to the Grievant, that he was assigned an in-car camera. The May 18, 2020, counseling memorandum specifically placed the Grievant on notice of the expectation for him to use the in-car camera for interactions specified by policy. This includes safety inspection stops, as they necessarily involve field interviews, notwithstanding the Grievant's policy arguments. Agency Exh. 2. In this case, the Grievant had also used the vehicle's emergency lights, yet another criterion under the policy for use of the in-car camera. The Written Notice mentions that the incident was a "traffic stop," but the use of this term is superfluous, neither material nor essential to the nature of the offense or discipline, as it caused no ambiguity or confusion as to the incident in question.

The Grievant's evidence and testimony establishes the essential facts of the offense. The offense falls squarely within the scope of a Group II Written Notice as a repeat violation of policy and instruction. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of inappropriate behavior as charged in the Group II Written Notice. The Agency conceivably could have imposed lesser discipline, but its election for a Group II Written Notice, without further sanction, 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. In this case, the Grievant argues that the policy is ambiguous and, because the Agency drafted the policy, such ambiguity should mitigate the discipline. However, it is established that the Grievant's supervisors notified him to use the in-car camera for interactions under applicable policy, contrary to any suggestion of ambiguity focused on the definition of traffic stops (just one criterion).

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 repeat breach of instruction and policy could not be mitigated to less than the issuance of a Group II written notice.

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

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 II Written Notice, without further sanction, 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]

[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

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