



COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 11993

Hearing Date: September 12, 2023

Decision Issued: October 13, 2023

PROCEDURAL HISTORY

On May 24, 2023, Grievant was issued a Group II written notice of disciplinary action for failure to follow instructions or policy. On May 24, 2023, Grievant was issued a Group III written notice of disciplinary action with termination effective May 24, 2023 for untruthfulness/misrepresentation of official statements.

On June 22, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 24, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On September 12, 2023, a hearing was held at the Agency's training facility.

APPEARANCES

Grievant
Grievant's counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?

An Equal Opportunity Employer

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 Department of State Police employed Grievant as a Special Agent in one of its divisions until his removal on May 24, 2023.

Grievant had been employed with the Agency for more than 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

Although the Agency had issued a handgun to Grievant, Grievant preferred to carry a personal handgun that Grievant believed was easier to conceal.

In addition to his Agency-issued handgun, a Sig Sauer P320, Grievant possessed three personally owned handguns: a Sig Sauer 365, a Glock 43 and a Sig Sauer P229.

Because Grievant preferred to carry a smaller handgun than the Agency-issued handgun while working, Grievant alternated carrying the Sig Sauer 365 or the Glock 43 both on and off duty. The Sig Sauer P229 remained at all times in a bedroom in Grievant's home.

Grievant's position required that he drive unmarked agency vehicles. During the period from early August 2022 through early November 2022, Grievant changed agency vehicles multiple times.

Grievant was driving Vehicle-TH until sometime during August 2022 when Grievant switched vehicles with his supervisor, Supervisor-First Sergeant.

From some date in August 2022 until September 9, 2022, Grievant drove Supervisor-First Sergeant's vehicle, Vehicle-CI.

On September 9, 2022, Grievant and Supervisor-First Sergeant traded vehicles again, so that Grievant was again driving Vehicle-TH.

Unbeknownst to Grievant and Supervisor-First Sergeant at that time, when Grievant switched vehicles with Supervisor-First Sergeant on September 9, 2022, Grievant left his Agency-issued handgun under the driver's seat in Supervisor-First Sergeant's vehicle, Vehicle-CI.

During September 2022, Vehicle-TH was assigned to Special Agent. On or about September 14, 2022, Grievant provided Vehicle-TH to Special Agent. Grievant began driving one of the Agency's "spare" vehicles, Vehicle-FF, while awaiting assignment of a more permanent Agency vehicle.

Grievant did not remove all of his gear and possessions from Vehicle-TH when he transferred it to Special Agent on or about September 14, 2022. Special Agent observed that Grievant left a vest, a camera, "what appeared to be his [Agency-issued handgun] in the center console" and other miscellaneous equipment.¹

Grievant used Vehicle-FF until on or about November 9, 2022 when Grievant was assigned a new vehicle, Vehicle-NA.

Grievant removed the remainder of his gear and possessions, including the handgun the Special Agent had observed in the console, from Vehicle-TH on or about November 14 or 15, 2022.²

At some point in late November, Grievant realized that he could not locate his Agency-issued handgun.

Grievant contacted Special Agent on November 29, 2022 and asked if they could meet so that Grievant could search Vehicle-TH for Grievant's Agency-issued handgun. When Special Agent met with Grievant on November 29, 2022, Special Agent told Grievant that Grievant took the handgun the day that he went through Vehicle TH. Grievant then searched Special Agent's vehicle, Vehicle-TH, and did not find his Agency-issued handgun in Vehicle TH.

On November 29, 2022, Grievant was speaking with Special Agent and Senior Special Agent and told them that he could not find his Agency-issued handgun and that he intended to thoroughly search his house that following weekend and if he did not find the handgun he would need to report the missing handgun to Supervisor-First Sergeant.³

On December 12, 2022, Grievant reported to Supervisor-First Sergeant that his Agency-issued handgun was missing.

¹ Agency Ex. 9.

² See Agency Ex. 9. Special Agent's written statement identifies the date of this event as November 16, 2022. In the Written Notice the Agency identified the date as November 14 or 15, 2022 and during the hearing, Grievant and Special Agent both testified and identified the date that these events took place as on or about November 14 or 15, 2022.

³ Hearing recording at 1:48:54-1:49:33; 4:56:22-4:57:06, 4:58:44-4:58:58, 6:08:36-6:09:02.

On December 12, 2022, Grievant and Supervisor-First Sergeant searched Supervisor-First Sergeant's vehicle, Vehicle-CI, but did not find Grievant's Agency-issued handgun at that time.

On December 12, 2022, a criminal investigation was initiated regarding the missing weapon, as a potentially stolen gun.

Supervisor-First Sergeant asked Grievant to prepare a memo to the Colonel setting forth information regarding Grievant's reporting of his missing Agency-issued handgun. Grievant prepared a memo to the Colonel that was reviewed by Supervisor-First Sergeant and then submitted to the Colonel. The memo is dated December 14, 2022.⁴

On December 15, 2022, First Sergeant-C interviewed Grievant at Grievant's home as part of the criminal investigation.

On December 16, 2022, Supervisor-First Sergeant and another employee searched the vehicles that Grievant had driven to try to locate the Agency-issued handgun. Supervisor-First Sergeant found Grievant's Agency-issued handgun in Vehicle CI.

The criminal investigation was terminated once Grievant's Agency-issued handgun was found.

Grievant could not account for the location of his Agency-issued handgun from September 9, 2022 until December 16, 2022.

First Sergeant-A conducted the administrative investigation into the facts surrounding Grievant's missing handgun.

First Sergeant-A interviewed Grievant regarding his missing Agency-issued handgun on February 21, 2023 at Agency offices.

CONCLUSIONS OF POLICY

Unacceptable behavior is 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."⁵

⁴ Agency Ex. 7.

⁵ See Agency Ex. 11 (Virginia Dept. of State Police, General Order ADM 12.02).

The Group III Written Notice

The Virginia Department of State Police has issued General Order ADM 11.00⁶ which sets forth the Standards of Conduct and describes as its purpose “[t]o establish standards for honesty, integrity, impartiality, and conduct by Department employees and to list the types of violations that may result in disciplinary action.”

Paragraph 7 of General Order ADM 11.00 sets forth the standards for Truthfulness, Honesty, Integrity. Paragraph 7.a. directs that

Employees shall be honest and truthful and shall not lie, make any intentionally deceptive statements, misrepresentations and/or omissions during any job-related function (except as authorized when conducting criminal investigations as outlined by General Order OPR 8.10) and/or administrative investigation involving themselves or other employees.

Paragraph 7.i. provides that violations of this standard include, but are not limited to:

...

(7) Attempting to conceal, divert, or mitigate their true level of culpability in an administrative or criminal investigation.

Whether the Grievant engaged in the behavior alleged in the Written Notice and whether that behavior constituted misconduct

The Agency described the offenses in the Group III Written Notice as follows:

[Grievant] misrepresented the timeline of events related to his missing Department issued handgun during official interviews. During the criminal interview with [First Sergeant-C] on December 15, 2022, [Grievant] advised when [Special Agent] got his old issued [Vehicle-TH], he removed all his firearms, cleaned out the whole car at that time and put everything in the [Vehicle-FF]. [Grievant] said he knew he had left a gun in the [Vehicle-TH] and [Special Agent] saw the gun there, so he took the gun out thinking it was his issued pistol. When asked what the time frame was, he told [First Sergeant-C], the first three weeks of September and maybe the third week of September for when he got the weapon out. During the administrative interview with [Sergeant-A] on February 21, 2023, [Grievant] stated he believed he took all his equipment with him when he switched vehicles every time, including his weapons and vest. When asked if any of his issued items were left in [Vehicle-TH] when it was assigned to [Special Agent], [Grievant] stated there was a brief period when some of his items were left in [Special Agent’s] vehicle. [Special Agent] confirmed [Grievant] left one of his firearms and a vest in [Special Agent’s] vehicle from September 14, 2022 to November 14th or 15th, 2022. Even giving [Grievant] the benefit of

⁶ See Agency Ex. 4.

the doubt that his inaccurate statements about removing his firearms from each vehicle he transitioned from were due to reporting what he believed to be true, a handgun and a vest belonging to [Grievant] was left in [Special Agent's] vehicle for two months, which is significantly different than the three weeks he told [First Sergeant-C]. In addition, two months is not a brief period of time for leaving something in another's vehicle, which he told [Sergeant-A]. [Grievant's] gun was also not removed from [Special Agent's] vehicle the third week of September, but in mid-November. These inaccurate statements made by [Grievant] during official investigations are clear misrepresentations of the facts that appear to be made in an attempt to reduce the gross severity of his complacency for firearms security at work by altering the timeline of events. This is a violation of General Order ADM 11.00, paragraph 7,i., (7), which states: "*Attempting to conceal, divert, or mitigate their true level of culpability in an administrative or criminal investigation.*"

In his memo to [Colonel] dated December 14, 2022, [Grievant] advised he could not find his service pistol "about the first week of December." During his interview with [First Sergeant-C] the next day, [Grievant] was asked when he first realized his issued pistol was not under the shirt on the countertop in his garage. His response was recorded and was transcribed as: "*Shortly after, um, um, man, like, the middle of, maybe it's the first week of December, I forgot even what I wrote in that letter, I'd have to, I don't even remember to be honest with you. But, I think it was the first week of December...*" This quote reveals [Grievant] was focused on remembering the information he provided in his memo to the Superintendent, not answering the question itself. But he also said, "I don't even remember to be honest with you" before giving the same first week of December answer. The investigation revealed that [Grievant] was actively looking for his issued handgun by November 29, 2022. [Grievant] clearly knew his weapon was missing in November, but he officially stated more than once it was the first week of December. While the difference is minor (two to five days, depending on the interpretation of what the first week of December means) [Grievant's] response reveals he was trying to remember what his previous memo said instead of honestly answering when he noticed the gun was missing. Telling the truth is mandated during an administrative interview and should be easy to remember and repeat, especially the next day.

This totality of the circumstances revealed in this investigation show [Grievant's] actions are in violation of General Order ADM 11.00, Paragraph 7., a., "*Employees shall be honest and truthful and shall not lie, make any intentionally deceptive statements, misrepresentations and/or omissions during any job-related function (except as authorized when conducting criminal investigations as outlined by General Order OPR 8 10) and/or administrative investigation involving themselves or other employees.*"⁷

⁷ Agency Ex. 2.

In order to show a violation of paragraph 7(a) or 7(i) of ADM Order 11.00, the agency must prove an intent to deceive with respect to the statements identified in the Written Notice. This is a high burden.

Grievant's Statements to First Sergeant-C regarding Grievant's removal of items from Vehicle-TH.

The Written Notice asserts, and the Agency must prove, that Grievant made the following statements to First Sergeant-C with an intent to deceive or to conceal, divert or mitigate his true culpability: *[Grievant] advised when [Special Agent] got his old issued [Vehicle-TH], he removed all his firearms, cleaned out the whole car at that time and put everything in the [Vehicle-FF]. [Grievant] said he knew he had left a gun in the [Vehicle-TH] and [Special Agent] saw the gun there, so he took the gun out thinking it was his issued pistol. When asked what the time frame was, he told [First Sergeant-C], the first three weeks of September and maybe the third week of September for when he got the weapon out. . . . a handgun and a vest belonging to [Grievant] was left in [Special Agent's] vehicle for two months, which is significantly different than the three weeks he told [First Sergeant-C].*

First Sergeant-C testified regarding his interview with Grievant on December 15, 2022.⁸ First Sergeant-C's interview with Grievant covered Grievant's recollection of events related to Grievant's reporting of his Agency-issued handgun lost or stolen. First Sergeant-C testified that Grievant told him that when Vehicle-TH was assigned to Special Agent, Grievant had moved all of the weapons from Vehicle-TH to Vehicle-FF. When asked about the timeframe during which that had occurred, First Sergeant-C testified that Grievant indicated around the third week of September. First Sergeant-C stated that he, First Sergeant-C, presumed that Grievant was indicating that all of the guns, including the Agency-issued handgun were moved from Vehicle-TH to Vehicle-FF at that time because Grievant said "all of the guns."⁹ First Sergeant-C indicated that Grievant referenced Special Agent seeing the gun too. During the hearing, First Sergeant-C did not provide any detailed testimony regarding statements Grievant may have made to him regarding when Grievant retrieved a handgun and a vest from Vehicle-TH after that vehicle had been transferred to Special Agent or the length of time when a handgun and a vest may have been left in Vehicle-TH following the transfer to Special Agent. First Sergeant-C's investigation concluded after Grievant's Agency-issued handgun was found on December 16, 2022, that is within one day following First Sergeant-C's interview with Grievant. First Sergeant-C did not have any further interviews with Grievant. First Sergeant-C testified that following the interview on December 15th, he had questions about what he had heard and that if his investigation had continued, he would have wanted to ask further, clarifying questions of Grievant. First Sergeant-C did not specifically identify the statements for which he would want clarification or the clarification he would seek. Testimony from Special Agent and Grievant during the hearing confirmed that Grievant left some items in Vehicle-TH after Grievant had begun using Vehicle-FF and that among those items was one of Grievant's personally owned handguns.

⁸ Hearing recording at 1:08:20 – 1:32:16. No recording or transcript of First Sergeant-C's December 15, 2022 interview with Grievant was presented during the hearing.

⁹ Hearing recording at 1:14:30 – 1:15:42.

In the Written Notice, the Agency appears to have accepted Grievant's assertion that when he described taking all of his weapons out of a vehicle each time he transitioned vehicles, he was stating what he believed to be true at the time. Additionally, there appears to have been confusion regarding information coming from this interview about the activities in September during the internal review of the case file, as the Major who issued the discipline included a note that he had previously misinterpreted a statement made by Grievant related to when Grievant transferred Vehicle-TH to Special Agent, that became clearer when the Major reviewed the audio recording of the interview.¹⁰

Grievant moved items, including weapons, from Vehicle-TH to Vehicle-FF on or around September 14, 2022 when Grievant transferred Vehicle-TH to Special Agent. Grievant retrieved his remaining items from Vehicle-TH, including a handgun, on or around November 14 or 15, 2022.¹¹ Although First Sergeant-C credibly testified about his recollection of his interview with Grievant, in the absence of more context and detail from that interview, it is not clear that Grievant's statements to First Sergeant-C about exactly when he retrieved his items from Vehicle-TH were made with an intention to deceive or conceal rather than simply made with imprecision in the moment. Indeed, during the hearing more than one participant had to correct himself or provide additional clarification when describing various time frames and inadvertently misstating one month for another or one date for another.

Grievant's Statements to First Sergeant-A regarding Grievant's retrieval of items from Vehicle-TH

The Written Notice asserts, and the Agency must prove, that Grievant made the following statements to First Sergeant-A with an intent to deceive or to conceal, divert or mitigate his true culpability: *During the administrative interview with [Sergeant-A] on February 21, 2023, [Grievant] stated he believed he took all his equipment with him when he switched vehicles every time, including his weapons and vest. When asked if any of his issued items were left in [Vehicle-TH] when it was assigned to [Special Agent], [Grievant] stated there was a brief period when some of his items were left in [Special Agent's] vehicle.*

As noted above, in the Written Notice, the Agency appears to have accepted Grievant's assertion that when he described taking all of his weapons out of a vehicle each time he transitioned vehicles, he was stating what he believed to be true at the time. The Written Notice identifies as deceptive Grievant's statements to First Sergeant-A using the phrase "brief period of time" to describe the period of time during which Grievant's items, including a handgun, were left in Vehicle-TH after it was transferred to Special Agent. What may or may not be considered a "brief period of time" is subjective and may differ among individuals of different background and in differing contexts. First Sergeant-A testified credibly about his interview with Grievant, but he did not testify specifically about this alleged assertion by Grievant.¹² Based on the evidence provided, it is not clear that any

¹⁰ Agency Ex. 3 (Memo from Major to File, May 22, 2023). The recording of the interview is not part of the exhibits in this case.

¹¹ Grievant retrieved the remaining items from Vehicle-TH on a specific date in November, Grievant and Special Agent both referred to that date at different times as November 14 or 15. Ex. 9 referenced that event happening on November 16, 2022.

¹² Hearing recording at 1:56:47-2:23:16. No recording or transcript of First Sergeant-A's interview with Grievant was presented during the hearing.

reference to the period of time from when Vehicle-TH was transferred to Special Agent in September 2022 and when Grievant retrieved his remaining items from Vehicle-TH in November 2022 as a “brief period of time” reflects an intention to deceive or an intention to conceal, divert or mitigate culpability.

Grievant’s statements regarding when he first realized his Agency-issued handgun was missing

The Written Notice asserts, and the Agency must prove, that Grievant made the following statements with an intent to deceive or to conceal, divert or mitigate his true culpability: *In his memo to [Colonel] dated December 14, 2022, [Grievant] advised he could not find his service pistol “about the first week of December.” During his interview with [First Sergeant-C] the next day, [Grievant] was asked when he first realized his issued pistol was not under the shirt on the countertop in his garage. His response was recorded and was transcribed as: “Shortly after, um, um, man, like, the middle of, maybe it’s the first week of December, I forgot even what I wrote in that letter, I’d have to, I don’t even remember to be honest with you. But, I think it was the first week of December...”*

On various occasions during the investigations into his missing Agency-issued handgun, Grievant stated that he discovered his Agency-issued handgun was missing “about the first week of December.” The Agency asserts that the way the Grievant relayed this information to First Sergeant-C when he paused and initially stated that he could not remember what he put in the memo to the Colonel and then again stated the first week of December, are proof of an intent to deceive. In the absence of more context and without being able to observe the exchange, the Hearing Officer is unable to reach the same conclusion. The evidence in the record is clear that Grievant was actively searching for his Agency-issued handgun by November 29, 2022. During calendar year 2022, November 29th fell on a Tuesday. Although not precise, a reference to “about the first week of December” could reasonably refer to the week that included both November 29th and December 1st.

The Agency appears to have taken the position that the “totality of circumstances revealed in this investigation” may require consideration of Grievant’s assertions that he saw the Agency-issued handgun on a workbench in his garage on or about September 30, 2022 and again on or about November 9, 2022 and that the culmination of those statements that later proved to be factually inaccurate with the statements identified in the Written Notice show an intent to deceive. Indeed, based on the information provided in the Agency’s exhibits and First Sergeant-A’s testimony, those statements appear to have been the primary focus of concern during the Agency’s internal review of this matter. The Agency, however, did not include Grievant’s statements about seeing the handgun on a workbench in September and November as part of the charges in the Written Notice because, it appears, the Agency accepted Grievant’s explanation of his assumptions and imprecise wording when he made those statements.¹³ The Hearing Officer cannot second guess or ignore that decision by the Agency.

The Agency has not met its burden of proving that the Grievant made intentionally deceptive statements, misrepresentations and/or omissions or statements intended to

¹³ Agency Ex. 3 (Memo from Major to Grievant, May 24, 2023).

conceal, divert, or mitigate his true level of culpability in the administrative or criminal investigations as set forth in the Group III Written Notice.

The Agency considered as an aggravating factor a Group I offense from 2012 that included two “not sustained” allegations against Grievant for making false official statements. The Agency may consider this information as informative as to the Grievant’s credibility. Even assuming such allegations would raise a question as to Grievant’s credibility, the Agency still cannot meet its burden of proving that the statements identified in the Written Notice in this case were made by Grievant with an intent to deceive or to conceal, divert or mitigate his true culpability.

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)

Because the Agency has not met its burden of proving that the Grievant engaged in misconduct, the Agency’s discipline was not consistent with policy.

Because the Agency has not met its burden of proof, there is no need to consider mitigating or aggravating factors with respect to the discipline issued pursuant to the Group III Written Notice.

The Group II Written Notice

Paragraph 8 of General Order ADM 11.00 sets forth standards related to State or Employee Property and Resources and Paragraph 8.a. states that “[e]mployees are expected to exercise due diligence to ensure that state property and resources are not misused, damaged, lost or stolen.”¹⁴

Paragraph 12.a of General Order ADM 11.00 directs that “employees shall comply with all local, state, and federal laws.

Virginia Code § 18.2-287.5 requires that

[i]f a firearm is lost or stolen from a person who lawfully possessed it, then such person shall report the loss or theft to a local law-enforcement agency or the Department of State Police within 48 hours after such person discovers the loss or theft or is informed by a person with personal knowledge of the loss or theft.

The Agency’s General Order OPR 1.08 states as its purpose “[t]o provide guidelines for possession and use of the Department-issued handgun and other firearms.”¹⁵

Paragraph 1 of General Order OPR 1.08 directs that

¹⁴ Agency Ex. 4.

¹⁵ Agency Ex. 5.

While on duty, each sworn employee shall carry a Department-issued handgun in a Department-issued holster. When carrying a handgun in civilian clothes, the sworn employee will carry the firearm as inconspicuously as possible.

Whether the Grievant engaged in the behavior alleged in the Written Notice and whether that behavior constituted misconduct

The Agency provided Grievant with a handgun that he was required to carry while on duty. Grievant did not carry his Agency-issued handgun while on duty. Grievant preferred to carry one of his personal handguns while on duty because he found it to be more easily concealed. Grievant did not carry his Agency-issued handgun while on duty, as required, for at least three months from September 9, 2022 until December 12, 2022 in violation of Paragraph 1 of General Order OPR 1.08. During the hearing, Grievant admitted that he violated policy when he did not carry his Agency-issued handgun while on duty.¹⁶

Grievant was responsible for properly securing his Agency-issued weapon. Grievant could not account for the whereabouts of his Agency-issued handgun for more than three months, from September 9, 2022 until December 16, 2022. Grievant did not exercise due diligence to ensure that his Agency-issued handgun was properly secured and was not misused, damaged, lost, or stolen in violation of Paragraph 8 of General Order ADM 11.00. During the hearing, Grievant admitted that he violated policy when he failed to properly secure his Agency-issued handgun.¹⁷

Grievant realized that he did not know the location of his Agency-issued weapon by November 29, 2022. When Grievant realized that he did not know the location of his Agency-issued handgun, § 18.2-287.5 of the Code of Virginia required that he report to appropriate authorities that his handgun was lost or stolen within 48 hours of such discovery. Paragraph 12.a of General Order ADM 11.00 required that Grievant comply with state laws and his role as a State law enforcement officer would make it especially important that he do so. Grievant testified that on November 29, 2022, Grievant told Special Agent, Senior Special Agent and others that he could not find his Agency-issued handgun and that he was going to search his house that weekend and if he still could not find the weapon he would then report it to Supervisor-Special Agent. Grievant did not report that his Agency-issued handgun was missing until December 12, 2022 – that is 13 days after his conversation with Special Agent and Senior Special Agent. Grievant did not report his Agency-issued handgun as lost or stolen within 48 hours of discovering that he had “no idea” where it was located. Grievant argues that he believed his weapon was misplaced, that is, that it was either in his home or workplace and not accessible to the public, such that he did not consider it “lost” until he reported that he believed it was missing to Supervisor-First Sergeant on December 12, 2022 (and then, after searching Supervisor-First Sergeant’s vehicle, Vehicle-CI). Paragraph 12.a. of General Order ADM 11.00 directs that “[e]mployees shall comply with all local, state, and federal laws.” On its face, Virginia Code § 18.2-287.5 does not distinguish between “lost” and “misplaced” in the manner that Grievant does. A reasonable reading of the law would require Grievant

¹⁶ Hearing recording at 5:36:16-5:36:57.

¹⁷ Hearing recording at 5:36:16-5:36:57.

to have reported his Agency-issued handgun as lost within 48 hours of realizing that he had no idea where the handgun was located. Particularly, if, as Grievant has asserted at different points in this case, his last recollection of a potential location of the loaded handgun, at that time, was on a workbench in his garage which he does not keep locked.¹⁸

It is clear that Grievant violated Agency policies when he failed to carry his Agency-issued handgun while on duty for at least three months, failed to exercise due diligence to ensure that his Agency-issued handgun was properly secured and was not misused, damaged, lost, or stolen when he could not account for the location of his Agency-issued handgun for more than three months and when he failed to comply with law and report his Agency-issued handgun as missing within 48 hours of discovering that he could not locate it.

Whether the Agency's discipline was consistent with law and policy

Violation of policy is a Group II offense.¹⁹ Each violation of policy can be treated as a separate Group II offense. As a mitigating factor, the Agency considered Grievant's assertion that other members of Grievant's office also did not carry their Agency-issued handgun while on duty. Although the Agency identified as an aggravating factor an inappropriate, informal reassessment of Grievant's most recent performance evaluation, even in the absence of aggravating factors, the issuance of a Group II Written Notice for violation of policy is warranted and reasonable.

Taking into consideration the mitigating factors, the Agency combined the separate policy violations into a single Group II written notice. The Agency's discipline was consistent with law and policy.

Mitigation

Because the Agency has not met its burden of proof with respect to the Group III Written Notice, there is no need to consider mitigating or aggravating factors with respect to the discipline issued pursuant to the Group III Written Notice.

Virginia 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..."²⁰ 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

¹⁸ Agency Ex. 7.

¹⁹ Agency Ex. 11 at Attachment A.

²⁰ Va. Code § 2.2-3005.

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 the disciplinary action with respect to the Group II Written Notice.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a Group II written notice of disciplinary action for failure to follow instructions or policy is **upheld**. The Agency's issuance of a Group III written notice of disciplinary action with termination for untruthfulness/misrepresentation of official statements is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if that position is filled, to an equivalent position. The Agency is directed to provide **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.²¹

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

²¹ 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.