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. 12000

Hearing Date: October 5, 2023
Decision Issued: October 11, 2023

PROCEDURAL HISTORY

On April 27, 2023, Grievant was issued a Group I Written Notice of disciplinary action. The offense was unsatisfactory performance.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 14, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On October 5, 2023, a hearing was held by online remote video, the earliest date available to both 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
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy ... "the hearing officer reviews the facts *de novo* ... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

DHRM Policy 1.60, Standards of Conduct, requires employees (among other things) to:

- Meet or exceed established job performance expectations.
- Comply with the letter and spirit of all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 3.

A Group I offense includes acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention. Unsatisfactory performance falls squarely within a Group I offense, and the agency has the discretion to issue written counseling or issue a Group I Written Notice. The Standards of Conduct, Agency Exh. 3.

The Offense

The Group I Written Notice, issued by the Grievant's superior on April 27, 2023, detailed the facts of the offense, and concluded:

> The evidence to support this disciplinary action occurred on March 7, 2023, when [the Grievant] and Officer M responded to a request from hospital security officers to assist with a disorderly subject at the Panera who was yelling and cursing at the staff. [The Grievant] was able to de-escalate the subject by speaking with him at length but in the end, needed to detain him. Both [the Grievant] and Officer M secured both arms and walked the subject out of the establishment, who was then placed against a knee wall and handcuffed. At this time Sergeant K and Officer B also arrived on the scene. The suspect was frisked briefly and then escorted to the ER booth. Arriving at the ER booth, the suspect was seated on the bench while officers attempted to ascertain his identity and determine a course of action. Based on his statements and delusional and irate behavior, it was determined the subject met the criteria for an emergency custody order (ECO). Officers took note of the suspect's phone in his left pocket, touching it at one point, and placed his cash change from Panera in his right

pocket, however at no point was the suspect properly frisked or searched as defined in VCUPD's internal directives.

According to VCUPD *Written Directive §7-12 Handling Ill Subjects p4 :§h-3 states in part "The transporting officer shall ... and that the arrestee is carefully patted down for any instruments that could possibly be used to inflict personal harm to the subject. Officers should use their best judgment when securing mentally ill persons in their custody."* [The Grievant] failed to search a person who was in custody prior to transporting them from the location in which they were put into custody (i.e. the ER booth) and walked into the ER. The suspect clearly had items in his pockets as there were large bulges that were obviously apparent from the moment of police contact.

VCUPD *Written Directive §7-12 Handling Mentally Ill Subjects p4 §D-1-b states "The transporting officer must search every respondent under an ECO or TDO prior to transport"*. While the suspect was in the booth, the officers assisted the suspect with pulling up his pants back to his waist, which exacerbated the bulges in his pants. While seated, the bulges continued to be obvious.

According to VCUPD *Written Directive §6-5 Field Interviews and Pat Downs, p4 §B-4 states "While conducting a pat down, officers are only permitted to externally feel the outer layer of the suspect's clothing. An officer may not place their hands in pockets, unless they feel an object that could reasonably be a weapon, such as a firearm, knife, club or other items"*. The suspect was escorted into the ER waiting room which bypassed the magnetometer and wanding where he was admitted into triage time before ending up in Yellow ER#30. The suspect was held for one hour and twenty-one minutes before an actual search was conducted yielding a concealed firearm and possession of schedule I/II controlled substance. The firearm in question is a 5-shot I-Frame revolver that is 6.31 inches in length, 4.3 inches in height, 1.3 inches thick, and nearly a pound in weight. This is larger than most standard smartphones and nearly twice the weight by comparison.

[The Grievant] failed to properly search the suspect in custody before transporting them from where they were put into his custody (i.e. the ER booth) and walked into the ER. Additionally, in [the Grievant's] statement, he wrote, "Once detained, I conducted a pat down of the subject's outer layer of clothing and waistband." The suspect clearly had large objects or a large number of objects in his pants pockets; [the Grievant] should have taken additional action to determine what was in the suspect's pockets to dispel any risk of the presence of a weapon. The object(s) created such a bulge that any reasonable and prudent officer would have ascertained that the bulge could have been a weapon. Instead, no thorough pat down occurred and there was no determination of exactly what the suspect had in his pockets that created the large bulge. In the name of officer safety, there was an absolute need to make this determination and it did not occur until the suspect was already in a hospital room inside the ER having never been taken

> through the security checkpoint process. By not following VCUPD's standard procedures, [the Grievant] risked the safety of officers and the community/staff inside the ER and potentially jeopardized the perceived competence of the police department in an environment that is important we maintain.
>
> Upon review of VCUPD *Written Directive 1-1 Code of Conduct, #15 Unsatisfactory Performance,* which states in part, *"Department members shall maintain sufficient competency to properlv perform their duties and assume the responsibilities of their positions ... Unsatisfactory performance may be demonstrated by ...the failure to conform to work standards established for the employee's rank, grade. or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention ..."* [The Grievant's] performance during this incident was unsatisfactory and it requires immediate correction.

Agency Exh. 2. As circumstances considered, the Written Notice included:

> [The Grievant's] Letter of Mitigating Circumstances was considered. VCUPD does not agree that [the Grievant] provided a sufficient understanding of and justification for the actions taken/not taken during this incident and has decided to move forward with the Group I Written Notice. Additionally, [the Grievant] will be required to participate in heavy remedial training in the area of search and seizure, frisks, and pat downs, conducting complete self-initiation enforcement where he will be required to seek consent searches during stops and/or recognize instances that he does have the authority to search/frisk.

Agency Exh. 2.

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed the Grievant as a police officer, and the Grievant has been employed with the Agency successfully, without other active disciplinary actions.

The Grievant's direct supervisor, a patrol sergeant, testified consistently with the offense noted in the Written Notice. She testified that allowing an armed subject in the hospital ER was a very severe breach, and it has not happened before during her tenure. The ER has a security system for screening patients and visitors (a magnetometer and wands), but patients brought in by police custody do not go through the routine screening because they would have been searched first by the police—a more reliable screening. (This subject was handcuffed, and the handcuffs and police weapons would trigger the magnetometer.) Her opinion is that the Grievant did not perform an adequate initial pat down at the Panera restaurant, and failed to perform the required search at the ER police booth before admitting the subject to the ER. She also testified that the security video of the scene corroborated that the subject's pants were baggy, with deep pockets, but the bulge in the subject's pants caused by the firearm was rather noticeable on video. Agency Exh. 11. The weapon, a revolver, was a "smaller" size type.

Police lieutenant testified that he issued the Group I Written Notice, and that he reviewed the circumstances and weighed the appropriate level of discipline. He considered a letter of counseling, which was issued to two other officers involved in the incident, but he could not justify a letter of counseling for the Grievant because he was the officer in charge, conducted the initial frisk and failed to perform the fuller search at the ER booth when obtaining the emergency custody order (ECO) for the subject. The lapse of security could have been catastrophic. The lieutenant pointed out that the security video revealed that the Grievant admitted at the scene that he should have searched the subject in the ER booth. Regardless of the bulge in the subject's pants, there was a requirement to search the subject once he was in emergency custody. The lieutenant confirmed that police do not use the security metal detectors at the hospital because their subjects would have already been searched, and that did not happen in this instance.

Police major testified that a person in emergency custody should never have a weapon in the ER. The major agreed with the Group I level of discipline. This incident was very serious and could have been tragic. The Agency's employee relations consultant testified that he reviewed the circumstances and agreed that the level of discipline was appropriate.

The chief of police testified that he had the final decision on the level of discipline. He believed that the offense was appropriately a Group II offense, but he considered the Grievant's work record and tenure as mitigating factors. The circumstances could not justify any level of discipline below a Group I Written Notice. The Grievant was the primary officer and had the sole responsibility for searching the subject.

Through his testimony, the Grievant sincerely admitted to his misconduct, and raised no factual disputes. The Grievant testified that he was concerned about the subject's back story—with his wife in the hospital to give birth. The Grievant was concerned about the subject's mental stability and detained him at the Panera restaurant at the hospital. His pat down of the subject at the time, while detecting a hard object, did not raise a suspicion of a weapon. The Grievant admitted that he understood applicable policy and that he should have searched the subject in the ER booth when the ECO was obtained. He points out that one of the other officers who received a letter of counseling was a sergeant (a supervisory rank). The Grievant asserts that mitigating circumstances should weigh in favor of a reduction of the Group I Written Notice to a letter of counseling like the others.

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 supportive of the Group I Written Notice.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice. The Grievant admitted the misconduct. Regardless of the thoroughness of the initial pat down at the Panera restaurant, the Grievant did not conduct the required search in the ER booth when the ECO was obtained. This failure allowed the subject to possess the loaded handgun inside the ER that put the subject, officers, and hospital staff at great risk. This failure, alone, is sufficiently serious to justify at least a Group I Written Notice.

The Grievant, by counsel, makes the point that the policy, 7-12 *Handling Mentally Ill Subjects*, Agency Exh. 7, requires a "transport" to invoke the requirement of a search. *"The transporting officer must search every respondent under an ECO or TDO prior to transport."* Counsel's contention is that there was no "transport" because the subject was detained at the hospital premises because the Panera restaurant is at the hospital. I find reliance on this point unpersuasive and without merit because the Grievant himself never asserted the policy applied

this way, through training or experience, and the Grievant admitted he was responsible for the search of the subject and failed to perform it. Regardless, I find it inconceivable that policy would be intended or construed in such manner to exclude the search under such pointless distinction.

The Grievant's evidence and testimony establish the essential facts of the offense. The offense falls squarely within the scope of a Group I Written Notice. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of unsatisfactory performance as charged in the Group I Written Notice. The Agency conceivably could have imposed lesser discipline, but its election for a Group I Written Notice is within its discretion to impose progressive discipline.

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

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation. A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that it already mitigated from a potential Group II to a Group I 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.

A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. This offense was not a situation outside the Grievant's control.

The Grievant had an established 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. The Grievant made a credible case for mitigation on the ground that the discipline was disparate treatment, considering the other letters of counseling. However, I find that the other employees are not similarly situated—the Grievant was the lead officer and had the responsibility to conduct the missed search. The Grievant also had an opportunity to discover the weapon during the initial pat down. Thus, the Grievant has not established disparate treatment.

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 I Written Notice 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.

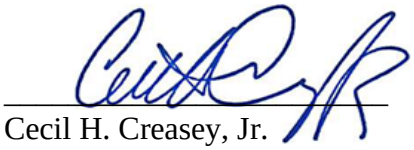
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.