

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

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 12027**

Hearing Date: December 19, 2023
Decision Issued: December 22, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed effective October 30, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on November 10, 2023 and the Grievance Hearing was scheduled for December 19, 2023, with a copy of all exhibits and list of witnesses to be provided no later than December 12, 2023.

The Grievance Hearing was conducted on December 19, 2023 as scheduled.

The grievance hearing addressed the following Written Notice:

Group II Written Notice issued on October 6, 2023 based on the Grievant's involvement in a motor vehicle accident while driving an Agency vehicle, in violation of DHRM Policy 1.60, Standards of Conduct, Preventable Accident-Simply Ordinary Negligence. (Agency Exhibit 4, Page 46)

APPEARANCES

Grievant

Agency Party Designee
Agency's Advocate

ISSUES

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Did the Grievant's conduct constitute a Group II violation under the Standards of

- Conduct?
3. Whether the Agency considered mitigating and aggravating factors as to the Written Notice?
 4. Was the Written Notice consistent with law and policy?

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 Grievant 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) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with tabs 1-8.

The Grievant Exhibits admitted into evidence are contained in one notebook with tabs A-I.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness called to testify, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a Transportation Operator II with such employment governed by the following:

- DHRM Policy 1.60 Standards of Conduct (Agency Exhibit 1)
- VDOT Safety And Health Manual (Agency Exhibit 2)

The Agency's first witness was CM Maintenance Superintendent who was supervising the Grievant at the time of the incident. CM testified that on May 11, 2023 the Grievant was assisting setting up a work zone when the Grievant pulled out onto the highway and struck an oncoming car, significantly damaging the VDOT truck and the private citizen's car. CM testified that by the Grievant's negligence the Grievant failed to follow the Standards of Conduct requirement that all employees "Conduct themselves at all times in a manner that supports the mission of their Agency and the performance of their duties." (Agency Exhibit 1, Page 7)

CM further testified that the VDOT Safety and Health Manual sets out the disciplinary action which may be taken when an employee incurs a "crash" while operating an Agency

vehicle (Agency Exhibit 2, Page 32-35) CM also referred to Agency Exhibit 3 which was a log of all training and classes the Grievant completed regarding the various facets of safely performing the Grievant's job functions.

CM testified that as a result of the crash and the Grievant being convicted for failure to yield right of way in General District Court on June 28, 2023, initially the Grievant was issued a Group III Written Notice on July 26, 2023, without termination (Agency Exhibit 5, Agency Exhibit 4). However, upon further consideration, it was decided to lower the Written Notice from a Group III to a Group II, without further discipline.

The Agency's second witness was MR, the District Safety Manager. MR testified that an Executive Review Committee, which consisted of a seven person panel, reviewed all of the information involving the Grievant's crash and unanimously concluded that the incident should be classified as "preventable" as provided in the Agency Safety and Health Manual (Agency Exhibit 2). MR further testified that the incident was considered to be very serious in light of the impact on the Agency including the personal injury and property damage suffered by a member of the public, the serious damage to the Agency vehicle, the time and expense involved in the investigation of the incident and the fact that the incident was very close to being catastrophic.

The Agency next called the Grievant to testify. In response to questions posed to the Grievant, the Grievant admitted that he started to pull onto the highway, hesitated due to obstructed visibility and then pulled onto the highway and struck the automobile.

The Agency's final witness was JG, the Employee Relations Specialist who testified that the Employee Relations office helps HR get through the grievance process and was involved in the Grievant's case. JG testified that the Grievant's discipline was mitigated at the third resolution step, ultimately resulting in the Group II Written Notice being issued on October 6, 2023 (Agency Exhibit 4, Page 48). JG further testified that employees involved in comparable incidents received Group III Written Notices, but without termination.

At the conclusion of JG testimony, the Agency rested its case.

The Grievant's testimony was brief. The Grievant pointed out that the notice of due process dated July 12, 2023 stated at the top of page 2 "Therefore, I find that a Group I is appropriate." However, in the very next sentence the letter states "Pursuant to the Standards of Conduct Policy 1.60, I am considering issuing a Group III Written Notice without termination for your preventable accident..." (Grievant Exhibit E)

The Grievant then proceeded to refer to Grievant's Exhibit I regarding another Agency employee who received a Group II Written Notice due to a backing up accident. The Exhibit indicated that the Hearing Officer in that grievance ruled that the Group II Written Notice should be removed from the employee's file. However, upon reviewing Exhibit I the Hearing Officer

finds that the other employee's case was substantially different from the Grievant's case.

Upon conclusion of the Grievant's testimony, the parties were given the opportunity to make closing statements.

CONCLUSIONS

Unacceptable behaviors are 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." (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer's to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "accordance with rules established by the Department of Human Resource Management...". Under the rules for Conducting Grievance Hearings "[a] hearing officer must give deference to the agency's consideration in the 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.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;
- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of

the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

After reviewing all of the Exhibits, the testimony of all of the witnesses and the arguments made, the Hearing Officer concludes as follows:

1. The Agency proved by a preponderance of the evidence that the Grievant was involved in a preventable accident, that such conduct constituted a violation of the Standards of Conduct of the most serious nature and could be charged as a Group III offense;
2. The Agency reduced the Written Notice to a Group II offense.
3. The Group II Written Notice was consistent with law and policy.

DECISION

For the reasons stated herein, the Agency's Group II Written Notice is upheld.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 12/22/23
Date


John R. Hooe, III
Hearing Officer

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