Issues: Group I Written Notice (conviction of moving traffic violation while driving a State vehicle), and Termination due to accumulation; Hearing Date: 08/07/17; Decision Issued: 08/26/17; Agency: VDOT; AHO: Ternon Galloway Lee, Esq.; Case No. 11036; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of
Case Number: 11036
Hearing Date: August 7, 2017
Decision Issued: August 26, 2017

SUMMARY OF DECISION

The Agency had found Grievant followed too closely in a state vehicle and thereby caused a preventable accident with vehicular damage. The Agency found the violation(s) warranted a Group I Written Notice. Further, the Agency terminated Grievant due to his accumulation of active group notices. The Hearing Officer found the Agency met its burden, the discipline was consistent with policy and law, and it was reasonable. Accordingly, the Hearing Officer upheld the discipline.

HISTORY

On May 1, 2017, the Agency issued Grievant a Group I Written Notice with termination due to his accumulation of two (2) active Group Notices. On May 24, 2017, Grievant timely filed his grievance challenging the Agency's discipline. The Office of Equal Employment and Dispute Resolution (EEDR)[1] assigned the undersigned as the hearing officer to this grievance on June 14, 2016.

The Hearing Officer held a telephonic prehearing conference (PHC) on June 28, 2017.[2] Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was August 7, 2017. Accordingly, by agreement of the parties, the hearing was set for that date. On July 6, 2017, the Hearing Officer issued a scheduling order addressing those matters discussed and ruled on during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. None were presented. The Hearing Officer then admitted the Agency's Exhibits 1 through 22, to include the contents in its binder. The Hearing Officer also admitted Grievant's Exhibit containing 18 pages. Further, the Hearing Officer's Exhibits 1 through 3 were admitted. There were no objections to the admission of any of the exhibits.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant

[1] EEDR was formerly known as the Office of Employment Dispute Resolution (EDR).
[2] This was the first date available for the PHC.

represented himself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (4 witnesses)[3]
Grievant
Witnesses for Grievant (3, including Grievant)[4]
Joint witness (4)

ISSUE

Was the written notice and termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant had been employed with the Agency for at least 18 years prior to his termination on May 1, 2017. (A Exh. 3/1).

2. Grievant's job title was Engineer Tech Sr. Maintenance. Grievant needed a driver's license to transport himself independently from location to location to perform his core duties. They included, among others, conducting field studies, researching, and reviewing and collecting information on the status of roadways. Thus, the Agency had assigned Grievant a state pick-up truck. (A Exh. 8/1-2).

Incident on November 17, 2016

3. On November 17, 2017, Grievant was driving a state vehicle on interstate 64 eastbound. He was in route to a designated area to mark utilities around a roadway lighting load center. At about 10:30 a.m., Grievant crashed into the back of Vehicle #2 on the interstate. The impact was such that Vehicle # 2 was pushed into the rear of Vehicle #1. The damage caused by the accident exceeded $1,500.00. A state trooper arrived on the scene to respond to this accident.

[3] Grievant also identified these individuals as witnesses for Grievant.
[4] Grievant identified another individual as a possible witness. Grievant was given the opportunity to call this person as a witness, but Grievant decided to not obtain testimony from this person.

(Stipulation of Parties; A Exh. 2; A Exh. 3; A Exh. 6/35).

4. Around 10:45 a.m., while still at the accident's scene, Grievant telephoned his immediate supervisor for that day[5] - Supervisor II - to inform Supervisor II of the accident**.** During the telephone call, Supervisor II asked Grievant what had happened and Grievant stated that his shoe was not tied and he had looked down just before the collision. (Testimony of Supervisor II; A Exh. 4/2).

5. Thereafter, Supervisor II arrived at the scene of the accident. Upon his arrival, the trooper responding to the accident (trooper) informed the supervisor that it would be about 20 minutes before he finished the paperwork, and then Supervisor II could leave with Grievant to have Grievant medically evaluated because of the accident. While waiting for the trooper to complete his paperwork, Grievant sat in Supervisor II's truck. At this point, Grievant told Supervisor II that his sugar had been elevated that morning and Grievant wondered if this increased level contributed to the accident. (Testimony of Supervisor II; A Exh. 4).

6. Once the trooper finished the paperwork, he issued Grievant a ticket for "following too closely." The citation summons Grievant to appear in General District Court on January 3, 2017, for the trial on the charged offense. While conversing with the trooper at this time, Grievant informed the trooper that Grievant believed the accident may have been medically related. (Testimony of Supervisor II; A Exh. 4; A Exh. 6/12, 14, 15).

Investigation and Safety Committees' Findings

7. Because Grievant's traffic accident involved a state vehicle, the Agency's safety committees investigated the accident. First, the Local Safety Committee examined the accident, followed by the Regional Safety Committee. By December 29, 2016, both groups had determined Grievant could have prevented the accident. A Exh. 3; A Exh. 5; A Exh. 8/2); Testimonies of Human Resource Benefits Specialists and Regional Operational Manager (ROM).

8. A report completed by the regional safety committee indicates that at the time of the accident the road was dry, it was sunny, the state vehicle driven by Grievant had previously been inspected within the last 12 months, there were no vehicular deficiencies reported, and visibility was good. The investigation concluded with a finding that Grievant had violated a safety practice or policy by "following too closely." (A Exh. 3). Also, the report indicated that no specialized training was required for Grievant to complete his task that day. (A Exh. 3/5).

Neither committee reviewed any medical documentation regarding Grievant. (Testimony ROM).

9. Even though the two safety committees found the accident was preventable and caused by Grievant's conduct, the Agency agreed to wait for the court's decision regarding Grievant's traffic violation citation. (Testimony of ROM; A Exh. 8/2).

[5] Grievant's regular supervisor was on leave on November 17, 2016. (Testimony of Immediate Supervisor).

10. The evidence is insufficient to establish that prior to the safety committees' finding that Grievant had informed the Agency of any diabetic or sleep apnea diagnoses by treating sources. (Testimony of ROM; A Exh. 6/9 and 11; G Exh.).

Action Taken by DMV

11. The trooper reported the accident to the Division of Motor Vehicles (DMV) for several reasons. One was Grievant's notification to the trooper that the accident may have been medically related. Also, the crash caused damage that exceeded $1,500.00. . (A Exh. 6/15 and 35).

12. On December 14, 2016, DMV wrote to Grievant and informed him that it had received information concerning Grievant's ability to safely operate a motor vehicle. The correspondence informed Grievant that he must submit a Customer Medical Report (CMR) from Grievant's treating sources regarding his medical condition. DMV required that the information submitted from his providers be based on examinations that were within the last six months. Providers completing this report were also required to address the accident and any medical factors that contributed to Grievant's accident. DMV's letter to Grievant indicated that the purpose of the report was for DMV to determine if Grievant could safely operate a motor vehicle on the roadways of the Commonwealth of Virginia. DMV imposed a deadline of January 13, 2017, for Grievant to submit an acceptable CMR. (A Exh. 6/15).

13. Next on December 16, 2016, DMV sent Grievant an Official Notice informing him that DMV would be conducting a medical review to determine if he could safely operate a motor vehicle on the roadways. Further, the notice indicated that the CMR was necessary for DMV to conduct its review. The notice also advised Grievant that his license would be suspended if DMV did not receive an acceptable CMR by January 14, 2017, at 12:01 a.m. (A Exh. 6/14).

14. Grievant was unable to timely submit the CMR to DMV because he was unable to obtain certain physician evaluations prior to DMV's deadline. Thus, on February 9, 2017, DMV suspended his license. (A Exh. 6/13).

15. DMV reinstated Grievant's license after he was terminated on May 1, 2017. Grievant reported DMV reinstated his license on May 18, 2017. (A Exh. 1/11).

Court's Outcome

16. On January 3, 2017, Grievant appeared in General District Court for his trial on the "following too closely" charge. The court convicted Grievant of the offense. (A Exh. 6/12).

17. Grievant appealed the conviction to the Circuit Court. During the Circuit Court proceeding on April 11, 2017, Grievant entered an Alford Guilty Plea to the charge. The Court withheld its finding, continued the case until October 10, 2017, and noted that Grievant's charge would be dismissed if he had no new charges as of October 10, 2017. (A Exh. 6/3 through 12).

Group I Written Notice

18. Before making its decision regarding any disciplinary action imposed on Grievant, management had agreed to await the outcome of Grievant's appeal before the Circuit Court. As noted above, the Circuit Court issued its ruling on April 11, 2017. Thereafter, on May 1, 2017, management issued Grievant a Group I Written Notice with termination. The group notice specifically described the offense(s) as follows:

> Following too closely in a state vehicle on November 17, 2016, resulting in a preventable accident with vehicular damage. Due to the seriousness of your actions and the accumulation of two (2) active Group Notices, your employment with Virginia Department of Transportation (VDOT) is terminated, effectively immediately.

(A Exh. 1/1)

Elevated Blood Sugar Level

19. Grievant reported that normally, Grievant's blood sugar level reads between 100-120. On the morning of November 17, 2017, Grievant discovered that he had a blood sugar reading of 292. (A Exh. 6/2). Grievant then telephoned an acquaintance at about 8:30 a.m. His acquaintance is also a Licensed Professional Nurse (LPN). During their telephone conversation, Grievant informed LPN that his blood sugar level was about 292. He asked if that was considered really high and what are the effects of an elevated sugar level. The acquaintance response was based on her experience as an LPN and a diabetic. LPN either informed Grievant or it was already known by him that she also was diabetic. LPN informed Grievant that a reading of 292 was really high. She also told Grievant that such an elevated level could cause dizziness, sleepiness, and non-responsiveness. (Testimony of LPN).

20. Even though Grievant had been informed of the effects of a high blood sugar level and that his blood sugar level as reported was considered "really high" on the morning of November 17, 2016, Grievant elected to drive that morning.

Disciplinary History

21. Grievant's disciplinary history consist of an active Group III Written Notice issued on January 20, 2016, for several serious infractions occurring from November, 3, 2015, to December 8, 2015. Those infractions included fraud, waste, and abuse. At the time management issued the Group III Written Notice, it also suspended Grievant for 30 days. (A Exh. 11).

22. Further, on October 27, 2015, Grievant received a counseling memorandum for damaging state equipment after being involved in a vehicle crash. The crash had occurred on August 24, 2015, and Grievant was issued a traffic summons for "following too closely." Grievant had failed to stop in time to avoid a rear end collision. The Agency found that Grievant could have prevented the accident. Grievant was warned in that memorandum that another infraction of a similar nature would be "dealt with in strict accordance with the Standards of Conduct." (A

Exhs. 20 and 21).

23. After his first vehicular accident on August 24, 2015, Grievant successfully completed the "Fleet Driver Safety" online course and classroom defensive driver training. He was then permitted to resume operations of equipment for his job position. (A Exhs. 20 and 22).

Medical Information

24. On February 6, 2017, Grievant sent an email to the Agency's business coordinator. That email indicated that Grievant had been diagnosed with diabetes and prescribed a medication for the condition. (A Exh. 6, p. 9).

25. A letter dated January 31, 2017, from a physician at the Department of the Army states that Grievant has type 2 diabetes mellitus and that it is under good control. (A Exh.6, p. 11).

26. A medical report dated July 13, 2017, shows relevant diagnoses of obstructive sleep apnea, and Type 2 diabetes mellitus without complication, without long-term current use of insulin. (G Exh., pp. 1-3). Medical documentation also suggests that by March 3, 2017, Grievant had been diagnosed with sleep apnea and was using a CPAP for the condition. The evidence is insufficient to establish that Grievant had been diagnosed with sleep apnea before on or about March 3, 2017. (G Exh., p. 5; *see also* A Exh. 1/9 (Grievant's April 24, 2017 Due Process Rebuttal Statement).

27. Although not required by the Agency, after the accident, Grievant brought to his supervisor, medical records or paperwork documenting his doctor appointments. (Testimony of Immediate Supervisor).

28. According to the Agency's response to Grievant's due process rebuttal, during Grievant's meeting with ROM on April 24, 2017, Grievant provided a medical report signed by a physician. The report included notes indicating that Grievant had informed the physician that Grievant had "dozed off" on November 17, 2016, which caused him to collide with another vehicle. Medical notes on the report provided to the Agency on April 24, 2017, mentioned that "per patient, he dozed off." [Patient] has no previous history and none since." (A Exh. 1/3).

Other Matters

29. After DMV suspended Grievant's driving license on February 9, 2017, Grievant's immediate supervisor modified Grievant's job duties due to the suspension. Grievant performed the new tasks assigned to him. (Testimony of Immediate Supervisor).

30. Grievant's driving record does not reflect that he was convicted of following too closely. (G Exh., pp. 12 – 13).

DETERMINATIONS 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/her 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).

Va. Code § 2.2-3000 (A) 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia,* the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline. Repeated Acts of an offense are deemed appropriate for a Group I Written Notice. Group II offenses are more than minor in nature or repeat offenses. Also, generally, the misbehaviors significantly impact agency operations. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. A subsequent group notice during the active life of a Group III Written Notice may result in discharge. *See* Standards of Conduct Policy 1.60.

On May 1, 2017, management issued Grievant a Group I Written Notice for the reasons previously stated here. The Agency also terminated Grievant due to his accumulation of two active group notices. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue(s) before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?

The Agency contends that on November 17, 2016, Grievant was following too closely on the highway in a state vehicle. Further, the Agency avers that Grievant's traffic infraction caused a preventable accident with vehicular damage. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

The undisputed evidence demonstrates that Grievant was involved in a traffic accident on November 17, 2016. The crux of the matter is whether Grievant could have avoided the incident. An examination of the particular facts shows that Grievant was driving a state vehicle in a congested area on interstate 64. The traffic slowed. Grievant struck the rear of the vehicle in front of him (Vehicle #2). The impact was such that Vehicle #2 was pushed into the rear of Vehicle #1. The damage caused exceeded $1,500.00. The trooper responding to the accident issued Grievant a citation for "following too closely."

The evidence also establishes that Grievant gave varying statements regarding the accident. First, about 15 minutes after the accident, Grievant telephoned his supervisor and informed his superior that Grievant's shoe was untied and Grievant had looked down just before the collision. Second, once Grievant's supervisor arrived at the accident scene, Grievant told his supervisor that his blood sugar level was elevated that morning and he wondered if this condition contributed to the accident. Third, while still at the accident scene and conferring with the trooper, Grievant told the trooper that he believed the accident may have been medically related.

Because the accident involved a state worker and vehicle, the Agency's local and regional safety committees investigated the incident. Their examination disclosed favorable driving conditions at the time of the accident. Specifically, the road was dry, it was sunny, the vehicle had no reported deficiencies, and there were no visibility issues. Both committees determined Grievant's behavior violated the acceptable standards of conduct under Policy 1.60 due to the lack of appropriated distance he maintained between his vehicle and Vehicle #2. Hence, these committees found that Grievant could have prevented his rear end collision with Vehicle #2. They made their determination by December 29, 2016. Even so, the evidence shows that before the Agency determined what disciplinary action it would take against Grievant, management agreed to wait for the outcome of Grievant's court proceedings.

At the trial in General District Court on January 3, 2017, the court found Grievant guilty of the traffic infraction. Grievant then appealed that conviction to the Circuit Court. Once appealed, by operation of law, Grievant's General District Court conviction was voided. This is so because an appeal to the Circuit Court afforded Grievant a new trial. [6] The Circuit Court trial

[6] §16.1-136 of the Code of Virginia, as amended stating in pertinent part that "[a]ny appeal taken under the provisions of this chapter shall be heard de novo in the appellate court …."; *See Gaskill v. Commonwealth,* 206 Va. 486, 144 S.E. 2d 293 (1965) (stating in pertinent part the following:

> Under Code § 16.1-136 an appeal taken in accordance with § 16.1-132 shall be heard de novo in the appellate court without formal pleadings, and the accused shall be entitled to trial by jury in the same manner as if he had been indicted for the offense in the circuit or corporation court. Such an appeal is in effect a statutory grant of a new trial to the accused, to be had before a court of record

occurred on April 11, 2017. During this proceeding, Grievant entered an Alford Guilty Plea[7] to the "following too closely" charge. The Circuit Court then continued the case until October 10, 2017, and noted that if Grievant had no new charges the Circuit Court would dismiss the charge.

The evidence shows that next Grievant received the due process notice from management on or about April 19, 2017. That notice indicated management's intent to issue Grievant a group notice with possible termination. In response to the due process notice, Grievant provided management with a medical report signed by a physician indicating he had been diagnosed with sleep apnea. Grievant asserted in his response that his medical condition caused the accident.

After thorough attention to the evidence, the Hearing Officer finds the Agency has met its burden and shown that Grievant's conduct – following too closely - caused the accident. She also finds that the conduct was a violation of safety procedures. Hence, the conduct was a disciplinary offense.

In making this determination, the Hearing Officer is mindful of Grievant's contention that a medical condition caused the accident. Accordingly, he in effect argues that it was not preventable. The Hearing Officer finds Grievant's argument unconvincing for the reasons mentioned here.

For one, and as referenced previously, Grievant's initial statement about the cause of the accident was that his shoe lace was not tied and he looked down for a moment. This statement suggests Grievant was inattentive to driving conditions immediately before the accident occurred. That said, the Hearing Officer acknowledges that at the hearing and sometime after Grievant received his due process notice from the Agency, Grievant avers he never told his supervisor that his shoe was untied. To the contrary, Grievant's supervisor testified that Grievant had indeed stated such. The Hearing Officer had an opportunity to observe the demeanor of the supervisor as he testified at the hearing. The Hearing Officer found this witness credible. In addition, the supervisor's testimony was substantiated by his written statement which documented what Grievant stated to him at the scene of the accident. Supervisor penned this statement close in time to when the accident occurred. Hence, the Hearing Officer finds it is reasonable to conclude that events were fresh in the supervisor's mind at the time he made the referenced documentation.

In addition to disagreeing with the supervisor's statement regarding Grievant's shoelace, Grievant argues that his sleep apnea caused the accident. The evidence demonstrates that it was not until spring 2017 that Grievant provided the Agency with notification and documentation that a physician had diagnosed him with sleep apnea. Conversely, Grievant's traffic accident

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> having original criminal jurisdiction. It annuls the judgment of the inferior tribunal as completely as if there had been no previous trial. It not only annuls the judgment of the inferior court, but it is reversible error to permit such judgment to be introduced in evidence before the jury on a trial of the case on appeal. Gravely v. Deeds, 185 Va. 662, [206 Va. 491] 664, 665, 40 S.E.2d 175, 176; Baylor v. Commonwealth, 190 Va. 116, 119, 120, 56 S.E.2d 77, 78, 79.

[7] An Alford Plea of guilt is a hybrid plea where the defendant pleads guilty and at the same time asserts his innocence. At the taking of an Alford Plea, the court hears a statement about the incident and makes a finding that the evidence is substantially against the defendant. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

occurred months before, on November 17, 2016. This notification was also months after the Agency's safety committees had determined that the accident was preventable. What is more, the evidence shows that on April 24, 2017, Grievant provided management with a medical report. Within the report, a physician stated that Grievant reported dosing off on November 17, 2016. Further, the physician mentioned in the report that Grievant had no prior history of dosing off and none since.

The Hearing Officer is not persuaded that any diagnosis of sleep apnea caused the accident. Hearing Officer makes this finding after considering, among other evidence, (i) the point in time when Grievant reported the diagnosis, (ii) the alleged single episode of "dozing off" on November 17, 2016, (iii) the alleged single episode conveniently coinciding with the date of the accident, (iv) Grievant's initial statement to his supervisor, and (iv) the self-serving statements Grievant reported to his physician.

Moreover, at one point, Grievant appears to argue that his reported high blood sugar level on November 17, 2016, may have contributed to the accident. Of significance, the evidence shows that two hours prior to the accident, Grievant was aware of his elevated blood sugar levels. He was also told during that time by an LPN who is also diabetic that elevated sugar levels could cause dizziness, sleepiness, and non-responsiveness. Yet, Grievant elected to drive on the highway. What is more, a medical note dated January 30, 2017 from Grievant doctor says his sugar is under good control. The Hearing Officer finds that the substantive content of this letter as well as its post-accident date fail to substantiate Grievant's claim.

Accordingly, after considering the totality of the evidence, the Hearing Officer is not persuaded by Grievant's defense that his medical condition caused or contributed to the accident.

B. Was the discipline consistent with policy and law?

As mentioned above, the evidence shows that the Agency has met its burden and shown that Grievant followed too closely in a state vehicle on November 17, 2016. Also, because of Grievant's conduct he ran into the back of Vehicle #2 and pushed that vehicle into Vehicle #1. In sum, the Agency demonstrated that the accident was preventable and caused damage that exceeded $1,500.00.

Further, the evidence illustrates that in 2015, the Agency found Grievant caused a preventable accident while driving a state vehicle by following too closely. Because the 2015 incident was Grievant's first offense, the Agency counseled Grievant. In addition, he took a defensive driving course and online safety course.

Because Grievant's preventable accident on November 17, 2016, was a recurrent offense, the Standards of Conduct under Policy 1.60 permits that Agency to issue a Group I Written Notice.

Further, Grievant also had an active Group III Written Notice for multiple offenses occurring in 2015 and 2016. The Standards of Conduct 1.60 also provide that the accumulation of an active Group III offense and any other level offense are grounds for termination.

On May 1, 2017, the Agency issued Grievant a Group I Written Notice for the preventable accident and also terminated him due to his accumulation of active Group I and III Written Notices. The Hearing Officer finds the Agency's discipline is consistent with policy and law.

II. Mitigation.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."[8] EDR's *Rules for Conducting Grievance Hearings* provides 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."[9] More specifically, the *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 discipline if it is within the limits of reasonableness.

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice and that the behavior was misconduct. And further, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable.

In his plea for mitigation Grievant asserts that he has not been convicted of a traffic offense and that the cause of the accident was his medical condition.

Grievant is correct that currently he has no conviction of the cited traffic offense. This is so because his conviction of the charge in General District Court was annulled by his appeal of the conviction to the Circuit Court. At the Circuit Court level, the Court accepted Grievant's Alford Plea of guilt. However, the Court in effect withheld its finding and continued the matter

[8] Va. Code § 2.2-3005 and (c)(6)

[9] *Rules for Conducting Grievance Hearings* VI(A)

until October 10, 2017.

That said, an Agency is not precluded from disciplining an employee under a scenario where the employee has been charged with an offense and not yet convicted of it in a court of law. The Standards of Conduct Policy 1.60 govern whether or not the conduct of an employee can subject an employee to discipline. In the case before this Hearing Officer, the Agency has met its burden and shown that Grievant was following too closely and caused an accident resulting in vehicular damage. Regarding Grievant's defense that his medical condition caused the accident. As noted before, Grievant's arguments were not persuasive.

In considering whether mitigation is warranted, the Hearing Officer also notes certain aggravating factors.

First, the evidence shows, that Grievant's misconduct was a repeated offense. Of note, subsequent to his first offense involving an accident because he was following too closely, Grievant had taken defensive and safety driving courses. Yet, on November 17, 2016, Grievant commits the same safety offense. This time his rear end collision involved three vehicles and damage in excess of $1,500.00.

Second, although the Hearing Office has found that Grievant failed to show the accident on November 17, 2016, was caused by his medical condition, she finds aggravating the fact that Grievant reportedly knew or suspected that his sugar was "really high" on the date of the collision. He had been told by an LPN two hours before the accident that high sugar could cause non-responsiveness, dizziness, and sleepiness. Still, by Grievant's own account, he risks the safety of himself and others on the highway. That is, he drove anyway with the knowledge that his sugar level could cause the noted symptoms that were a danger to driving.

Moreover, another aggravating factor is the evidence demonstrates that less than a year before the November 17, 2016 accident, the Agency had disciplined Grievant for multiple serious infractions involving abuse of state time, unauthorized use of state property, and falsifying state records. For these infractions, Grievant had been issued a Group III Written Notice with 30 days of suspension. The Agency had been lenient with Grievant and elected not to terminate him for the offenses. In addition, Grievant knew of should have known that if he received any further group notices he could be terminated. Nevertheless, Grievant drove in the manner he did on November 16, 2017.

Accordingly, having undergone a thorough deliberation of all the evidence whether specifically mentioned or not, the Hearing Officer finds the Agency's discipline is reasonable.

DECISION

Hence, for the reasons stated here, the Hearing Officer upholds the Agency's issuance of the Group I Written Notice for the reasons stated here.

Further, due to the accumulation of two active group Written Notices, the Hearing Officer upholds the termination.

APPEAL RIGHTS

You may file an **administrative review** request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Departmental of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.[10]

Entered this 26 day of August , 2017.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative
Grievant/Grievant's Advocate
EDR's Director of Hearings

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