



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11556

Hearing Date: September 28, 2020

Decision Issued: December 4, 2020

PROCEDURAL HISTORY

On March 16, 2020, Grievant was removed from employment pursuant to a fitness for duty evaluation.

On March 24, 2020, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The Agency failed to qualify the issue for hearing. The Office of Employment Dispute Resolution issued Ruling 2020-5095 qualifying the matter for hearing. On June 29, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 28, 2020, a hearing was held by video conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

1. Whether Grievant's removal was consistent with State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that his removal was improper. 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 State Police employed Grievant as a Sergeant in one of its divisions. He had been employed by the Agency for over 24 years. Grievant received a "Major Contributor" rating for his 2019 annual performance evaluation which he signed on September 13, 2019. He received "Extraordinary Contributor" rating for his 2016, 2017, and 2018 annual evaluations.

Grievant was absent from work in 2019 for medical reasons during the time periods:

March 19, 2019 to March 25, 2019
March 28, 20219 to April 4, 2019
June 24, 2019 to July 8, 2019
July 8, 2019 to August 5, 2019
December 17, 2019 to December 20, 2019

Grievant had adequate sick leave available to cover his absences due to illness. He retained significant leave balances available to him despite his absences from work.

On June 10, 2019, the First Sergeant observed Grievant sweating, shaking, and nervous. Later in the day, Grievant told the First Sergeant that Grievant had received good news from his doctor. Grievant said the symptoms he displayed related to his gall bladder. Grievant said he needed surgery but was happy because he now had a path forward to getting well.

Grievant was absent from work from June 24, 2019 to August 5, 2019 following his surgery.

Grievant received an informal counseling on August 12, 2019 for missing supervisor calls and on August 13, 2019 for inadequate trooper vehicle inspections and handling videographic evidence.

Grievant began missing work intermittently due to illness. Grievant told the First Sergeant that Grievant's doctor said Grievant was experiencing an adverse reaction between his gall bladder and his diet.

The First Sergeant continued to have concerns about Grievant's work performance. The First Sergeant planned on giving Grievant a performance oriented counseling and written instructions by memorandum dated December 30, 2019. He was unable to issue the counseling because of an investigation of Grievant's alcohol use.

On December 31, 2019, the First Sergeant asked Grievant to meet. The First Sergeant wanted to discuss Grievant's poor work performance. They agreed to meet on the following day. Grievant was worried about meeting with the First Sergeant, so he consumed alcohol at approximately 3 am. He had been sick and he also consumed prescription medication for his cough at approximately 5 a.m.

On January 1, 2020, Grievant put on his uniform, got into his State Police vehicle and began driving towards the Office. He stopped along the way to get a cup of coffee and then drove to the local Office. He arrived at the Office at approximately noon. Grievant spoke with the First Sergeant who noticed that Grievant's eyes were watery and bloodshot and his complexion was red. As Grievant walked into the First Sergeant's office, the First Sergeant noticed that Grievant's gait and behavior were odd. The First Sergeant noticed Grievant's eyes were watery and bloodshot. Grievant's complexion was red. The First Sergeant smelled a strong odor of alcohol coming from Grievant. The First Sergeant obtained a Preliminary Breath Test machine and required Grievant to exhale into the machine. Grievant's breath showed an alcohol level of .065. The First Sergeant drove Grievant home. On the way, the First Sergeant asked Grievant if he had a drinking problem. Grievant replied, "I got a problem and I'm dealing with it."¹

On January 3, 2020, Grievant was placed on pre-disciplinary leave with pay pending the Agency's investigation.

Grievant knew he had a problem with excessive alcohol consumption prior to the January 1, 2020 meeting.

By reporting to work on January 1, 2020 after having consumed alcohol, Grievant violated General Order 12.02 governing, "Use of Alcohol or unlawful use or possession of controlled substances while on the job." The Agency began its process for determining whether to issue Grievant a Written Notice. In memorandum dated March 20, 2020, Captain W informed the Agency Head that Captain W believed Grievant should receive a Group III Written Notice with removal. Captain W indicated the Grievant had been removed based on fitness for duty and it was unnecessary to take further action.

On January 15, 2020, Grievant was admitted to a Residential Treatment Facility. In this program he was to receive three to four individual therapy sessions per day as well as therapy group modules per day. These sessions were conducted by impulse control and addiction specialists, anger management therapists, integrative therapists, and peer counselors. During treatment, Grievant was to attend 12-step meetings in the

¹ Agency Exhibit 21.

community. He also was to receive treatment from a psychiatrist for medication management. Grievant was discharged from the Residential Treatment Facility on February 11, 2020.

On February 5, 2020, the First Sergeant asked that the Agency to conduct a fitness for duty evaluation of Grievant. The First Sergeant drafted a ten page memorandum describing in detail his reasons for the request including his discussion of Grievant's poor work performance.

On February 19, 2020, the Agency contacted the contract provider to schedule a fitness for duty evaluation of Grievant.

Grievant met with Dr. S on February 24, 2020 for a fitness for duty examination. Dr. S interviewed Grievant for approximately one hour. Dr. S had spoken with the First Sergeant and read the First Sergeant's detailed ten page memorandum describing Grievant's poor work performance. Dr. S spoke with Grievant's wife and another sergeant working along with Grievant.

The Agency received Dr. S's report on March 10, 2020. Dr. S concluded Grievant was not fit for duty. Dr. S noted Grievant's "market deterioration in quality, as well as dependability to do his job and to do it accurately per expectations laid out in his job description." Dr. S concluded:

In view of the nature of his duty lapses, frequent redirection and active supervision, and the inability to correct course which was followed by an inability to fully acknowledge his difficulties in this interview, **I would not consider him fit to serve as a state trooper.** The job requires meticulous attention to detail, following instructions and completing tedious work even when it feels long and repetitive; the lives of his fellow officers and his subordinates heavily depends on his ensuring the quality of his work. He has completed his 28 day alcohol rehab process which has included therapy but he requires more therapy to address his response to stress. The picture he paints of things that stressed him out i.e. his son going to college and his physical condition causing the steep down-hill course of his performance does not match up and suggests either a lack of insight or withheld information. Also his not seeking aggressive treatment on his own rather than being forced into it suggest that he still does not fully recognize his problems. (Emphasis original.)

On March 16, 2020, Captain K called Grievant and told Grievant he was being removed from employment because Grievant was unfit for duty. Grievant was stunned and shocked to learn he would be losing his employment with the Department.

On March 17, 2020, the Superintendent sent Grievant a letter stating:

This letter is to notify you that you have been separated from the Department of State Police effective the close of business March 16, 2020. This separation is based on information I have received from our Department psychiatrist [Dr. S]. The results of your evaluation with [Dr. S] were received on March 10, 2020, in which she advised that you are not fit for duty. Fitness for duty is a condition of employment for a sworn member of the Department.²

The Agency began the disciplinary process because Grievant reported to work after consuming alcohol. On March 20, 2020, the Agency concluded that because Grievant had been separated from employment on March 16, 2020, there was, “[n]othing further is required related to this matter.”³

Grievant sought a fitness for duty evaluation from Dr. Se. Dr. Se conducted ten hours of personal interview and record review on July 13, 2020, July 30, 2020, August 6, 2020, August 25, 2020, and August 26, 2020.⁴ Dr. Se also interviewed Grievant’s Wife and the Clinical Director of the Residential Treatment Program Grievant attended. Dr. Se conducted psychiatric evaluation and psychological testing of Grievant. Dr. Se reviewed Grievant’s employee work profile and performance evaluations for the last four years. Dr. Se reviewed the First Sergeant’s ten page memorandum describing Grievant’s poor work performance. Dr. Se reviewed the report of Dr. S.

The Clinical Director told Dr. Se that Grievant “did really good work with a change in demeanor, outlook, and a commitment to sobriety.” Grievant’s Wife told Dr. Se that she was “aware of her husband’s drinking issues as he tried to self-medicate for his gallbladder pain and complications after surgery.”

Dr. Se stated about Grievant:

- Perceptions were within normal limits with sensory function intact without evidence of hallucinations or illusions.
- Thought processes and form of thinking revealed [Grievant] was able to reply capably to all questions asked, has the capacity for goal-directed thinking.
- There was no evidence of disturbances of continuity at thought or loose associations or with the absence of tangential, circumstantial, rambling, evasive, and perseverative thinking.
- His thought content revealed no disturbances in content of thought with an absence of delusions, preoccupations, obsessions, or compulsions.

² Agency Exhibit 22f.

³ Agency Exhibit 21a. This hearing decision does not address whether the Agency can resume disciplinary proceedings upon Grievant’s reinstatement.

⁴ Dr. Se also spoke with Grievant and his wife for approximately 1.5 hour on the day prior to the hearing.

- Upon exploration, there was an absence of phobias, plans, intentions, or recurrent ideas about suicide and absence of hypochondriacal symptoms or antisocial urges.
- Further examination revealed absence of any ideas of reference or ideas of influence that would be pathological.
- Sensorium and cognition on mental status examination revealed ability to sustain attention, environmental mental stimuli and to maintain goal-directed behavior throughout the examination.

Grievant's examination included psychological testing with the Minnesota Multiphasic Personality Inventory (MMPI). Dr. Se stated:

The results of his testing revealed excellent validity as suppressor scales, frequency scales, and lie scales were within normal limits. Clinical scales revealed no elevations or scores on any of the clinical scales including hypochondriasis, depression, hysteria, psychopathic deviance, paranoia, psychasthenia, schizophrenia, hypomania, social inversion or special sales of anxiety, depression, or abnormalities in ego strength. In summary, the MMPI was determined to be a valid one, and there are no indicates of somatic, cognitive, emotional, thought or behavior dysfunction in his protocol.⁵

Dr. Se made a clinical diagnosis that Grievant's alcohol use disorder was in remission and an unspecified anxiety disorder was in remission. Dr. Se found Grievant did not have a personality disorder. Dr. Se stated Grievant:

has been totally abstinent from alcohol since 7/21/2020. He attends three AA meetings a week. His unspecified anxiety disorder was characterized by symptoms of worry that caused some distress but did not meet the full criteria of panic disorder or generalized anxiety disorder. These symptoms demonstrated marked improvement after his treatment at the [Residential Treatment Program]. He has an increased understanding of how to utilize techniques including cognitive behavior therapy and mindful meditation to control his symptoms.⁶

Dr. Se concluded, "[t]o a reasonable degree of medical certainty, [Grievant] is fit for duty and fit to serve as a state trooper"⁷ His conclusion was as of July 13, 2020. Dr. Se believed that if Grievant were reinstated, Grievant would maintain sobriety and not resume consuming alcohol.

⁵ Grievant Exhibit 1.

⁶ Grievant Exhibit 1.

⁷ Grievant Exhibit 1.

CONCLUSIONS OF POLICY

The Agency's decision to remove Grievant must be reversed because Grievant was capable of performing his job duties on March 10, 2020 and fit for duty.

General Discussion of Law and Policy

29 CFR § 1630.13(b) provides, "[e]xcept as permitted in §1630.14, it is unlawful for a covered entity to require a medical examination of an employee" A covered entity "means an employer"⁸ "who has 15 or more employees"⁹ 29 CFR 1630.14(c) states, "[a] covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions."

Appendix to Part 1630 provides Interpretive Guidance on Title I of the Americans with Disabilities Act. Under this Guidance, the purpose of Section 1630.13(b) "is to prevent the administration to employees of medical tests or inquires that do not serve a legitimate business purpose." Section 1630.14(c) "permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job."

29 CFR § 1630.2(n) addresses essential functions:

(1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

⁸ 29 CFR 1630.2(b).

⁹ 29 CFR 1630.2(e).

- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

General Order ADM 14.10 governs Fitness for Duty. The purpose of his policy is:

To describe mental and physical examinations which may be required to ensure an employee is competent to perform the assigned job, and to explain conditions under which these tests may be required.

Under this policy, the Superintendent may require mental or physical examinations of an employee by a designated psychiatrist, psychologist, or physician when it is in the best interest of the employee or the Agency. Section 1 provides:

The purpose of these examinations is to assist the Department in making decisions to determine an employee's mental and physical fitness to perform his/her job.

The necessity for the fitness for duty examination can be based on “[p]ersonal observation of general appearance or unusual actions or behavior.”

Section 5(g) provides:

If the designated psychiatrist, psychologist, or physician determines the employee is not fit for full duty, a recommendation will be provided regarding whether the employee is able to work in a light-duty status or is unable to work at that time.

Discussion

The Agency’s decision to remove Grievant as unfit for duty must be reversed for several reasons.

First, a fitness for duty examination must focus on ability. The Agency’s policy describes this as “competency.” Fitness for duty is an opinion about the ability of an employee to perform the essential functions of the employee’s job at a point in time. An employee’s prior work performance may be significant as a descriptor or illustration of a lack of ability, but it cannot be a primary reason to conclude that an employee is unfit for duty. An employee’s poor performance does not mean that the employee lacks the ability to perform the duties of the employee’s job. An employee’s poor work performance may be corrected through the disciplinary or performance planning

processes but not through a fitness for duty examination. An agency may not use a fitness for duty examination as a pretext for removal for poor disciplinary performance.

The First Sergeant drafted a detailed memorandum identifying problems with Grievant's work performance. Dr. S relied heavily on the First Sergeant's report. She relied heavily on Grievant's reported prior poor performance to conclude that Grievant was unfit for duty. This observation follows from Dr. S's report and from Dr. S's testimony. Dr. S took, without disputing or questioning, the assessment of the First Sergeant as to Grievant's work performance. For example, Dr. S wrote, "Overall I did not get the feeling from either person (husband or wife) as to being actually aware of the seriousness of performance failures in the past year." Dr. S wrote the, "nature of his duty lapses, frequent redirection and active supervision, and the inability to correct course which was followed by an inability to fully acknowledge his difficulties in this interview...."¹⁰ These comments show Dr. S gave greater weight to Grievant's work performance than to his current competency to perform the essential functions of his position.

Second, Dr. Se's report is more persuasive than Dr. S's report. Dr. Se spent more time with Grievant. Dr. Se spoke with the Residential Treatment Director. Dr. Se evaluated Grievant using the MMPI which enabled him to obtain an objective tool to evaluate Grievant's mental health fitness.

Several of Dr. S's assessments support the conclusion that Grievant was fit for duty. For example, Dr. S said as part of her mental health examination:

His though process were linear and logical.
He did not derail or appear psychotic at any time.
Did not have any perceptual alterations.
No dark thinking.
No evidence of any anxiety or mania or hypomania noted.
He had a futuristic orientation and was hopeful about the future.
No evidence of any hopelessness or continued struggles with depression.
No ruminative thinking, no obsessive-compulsive thinking.¹¹

Dr. Se's analysis was deeper and more extensive as displayed in his report. His conclusions were logical and believable.¹²

Dr. S and Dr. Se made assessments at different points in time. It is certainly possible for an employee to be unfit for duty at one point in time, but fit for duty at a later

¹⁰ Agency Exhibit 22c.

¹¹ Agency Exhibit 22c.

¹² Dr. Se had a greater knowledge of details about Grievant. For example, Dr. S thought Grievant was a State Trooper and not a Sergeant. Dr. Se knew Grievant had been a State Police Sergeant.

point in time. In this case, however, it is unlikely that Grievant's fitness for duty changed materially from March 10, 2020 to July 13, 2020.

Dr. S believed that Grievant was forced into aggressive treatment. No credible evidence was presented to support this conclusion. Although Grievant may have realized he needed treatment in order to save his job and save his health, no evidence was presented showing that the Agency told him he should go to the Residential Treatment Program or instructed him to receive treatment. Thus, Dr. S incorrectly concluded Grievant was forced to receive treatment. This finding is important because Dr. S also concluded that Grievant needed additional treatment such as attending Alcoholic Anonymous (AA) meetings but did not establish a plan to attend AA meetings. In other words, Dr. S's belief that Grievant was forced into the Residential Treatment Program made it more likely Grievant would not seek additional treatment through AA meetings unless forced to do so. Dr. S noted that Grievant had continued attending AA meetings.

Dr. S believed Grievant had not acknowledged his drinking problem. The evidence showed Grievant clearly acknowledge his drinking problem which is why he elected to attend a Residential Treatment Program. Possibly the words Grievant spoke to Dr. S did not convince her he knew he had a drinking problem, but his behavior clearly demonstrated he had a drinking problem and was trying to correct it.

Third, Grievant's Employee Work Profile outlined his Core Responsibilities including:

- Performance Management
- Supervise Operations and Complies with Policy
- Reviews Reports
- Investigative Complaints, Use of Force, work-related injuries/illnesses and Department Vehicle Crashes
- Develops Work Skills and Knowledge of Subordinates
- Cross Trains Subordinate Personnel
- Coordinates Activities
- Prepares Schedules¹³

The Hearing Officer believes that as of March 10, 2020, Grievant was able to perform these Core Responsibilities. To the extent Grievant failed to perform these responsibilities, the Agency could take disciplinary action.

Fourth, the Hearing Officer's practice is to defer to an agency when it has evaluated the merits of a fitness for duty examination. Presumably, an agency has a deeper understanding of an employee's job and can better compare that understanding with the medical examination to determine whether the employee is fit for duty. The Agency's concern about the fitness of its employees is understandable. The damage an

¹³ Agency Exhibit 2a.

unfit law enforcement officer could cause to the Agency's reputation and to Virginia citizens is significantly greater than the consequences of having an unfit employee in most other State agencies.

The Agency's policy required the Agency to conclude that an employee was unfit for duty with the assistance of examinations from a medical professional. Nothing in the policy authorized the Agency to delegate its decision to a medical provider.

Deference is not appropriate in this case. The Agency did not review and evaluate Dr. S's conclusion that Grievant was unfit for duty. It appears that the Agency, in essence, delegated to Dr. S the decision to remove Grievant from employment for lack of fitness.¹⁴ It is not appropriate for the Hearing Officer to defer to the Agency in this case because the Agency did not separately conclude that Grievant was unfit for duty. The Agency should have taken Dr. S's recommendation, assessed the reliability of that recommendation, and then compared it to the Agency's understanding of the essential functions of Grievant's position in order to form its own conclusion that Grievant was unfit for duty.

If the Agency had presented evidence showing Grievant placed his coworkers or the public at risk of significant harm, the importance of giving deference would have been highlighted. No credible evidence was presented showing Grievant presented a material risk to public safety or his coworkers.

Fifth, the Agency's policy requires, "a recommendation will be provided regarding whether the employee is able to work in a light-duty status." Insufficient evidence was presented to show that the Agency considered placing Grievant on light duty status. Captain C testified that employees were either fit or unfit for duty and if unfit for duty, the Agency terminated those employees.

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

¹⁴ Captain C testified that, "We listen and act upon the doctor's instruction ... we defer to them."

The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **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.^[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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer