



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11496

Hearing Date: September 15, 2020

Decision Issued: October 9, 2020

PROCEDURAL HISTORY

On September 12, 2019, Grievant was issued a Written Counseling of disciplinary action for "circumstances involving the unauthorized copying of a Mason police body camera video and the subsequent delivery of the video to a person outside of the law enforcement community without authorization."

On October 8, 2019, 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 Office of Employment Dispute Resolution qualified the grievance in Ruling Number 2020-5023. On February 18, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 15, 2020, a hearing was held by video conference.¹

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Witnesses

¹ The hearing was scheduled and then delayed due to the corona virus pandemic.

ISSUES

1. Whether Grievant engaged in the behavior described in the written counseling?
2. Whether the behavior constituted misconduct?
3. Whether the University's action was consistent with law (e.g., free of unlawful discrimination) and policy?
4. Whether there were mitigating circumstances justifying a reduction or removal of the counseling, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the University to show by a preponderance of the evidence that the reassignment described in the counseling memo was warranted and appropriate. Grievant has the burden to prove the University's actions were the result of retaliation. 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 George Mason University employs Grievant as a Police Lieutenant on one of its locations. He has been employed by the University for approximately 19 years.

Grievant's working relationship with the Manager was strained. The Manager described Grievant as a "hard worker who can get things done" but also as a "negative disruptive force within the Mason Police Department."²

In 2018, Grievant filed a grievance with the University. That grievance was resolved by Grievant being given management responsibility for the University's evidence room. He was responsible for providing officers with body cameras. He was not to discuss what he observed on the body cameras with other officers.

Grievant was in charge of Evidence and Property until those duties were moved as part of the University's disciplinary action. He had been responsible for production of videos for evidence. He was not responsible for viewing videos for quality control or discipline.

² See, Second Step Response.

On January 28, 2019, Officer 1 participated in the arrest of an intoxicated man. Officer 1 placed his hand on top of the man's head and forced him into a police vehicle. Officer 2 was wearing a body camera and recorded the arrest.

Officer 2³ later watched the body camera video showing Officer 1's actions. Officer 2 used his cell phone to record the video as he watched it.

After recording the body camera video, Officer 2 contacted Grievant who worked on a different campus. Officer 2 told Grievant he was in possession of a video of another Department police officer using excessive force on a suspect who was under arrest and handcuffed. Officer 2 said the report of the incident was written by another officer and appeared to be fabricated to cover up the use of excessive force.

Officer 2 emailed his cell phone recording to Grievant and asked Grievant to look at it.

Grievant watched the cell phone recording and read the police report.⁴ Grievant concluded Officer 2's assessment was correct. Grievant concluded the cell phone recording showed Officer 1 using excessive force on a suspect who was not resisting. Grievant concluded the report was not consistent with the video and was written in a way to cover up the possible use of force.

Grievant asked Officer 2 to report the incident to the Manager.

Grievant followed up with Officer 2 to see if Officer 2 had reported the incident to the Manager. Officer 2 said he had not reported the incident.

Because Officer 2 had not reported the incident to the Manager, Grievant felt compelled to report the matter to his Supervisor. On August 12, 2019, Grievant informed the Supervisor of the incident and that Officer 2 used his cell phone to record the body camera footage. The Supervisor reviewed the video and report. The Supervisor concluded that Officer 1 used excessive force and the report appeared to be inconsistent with the video.⁵

³ Officer 2 resigned from the University on July 30, 2019 with August 11, 2019 as his last day of work.

⁴ Grievant did not access the Department's Body Camera Footage Archive.

⁵ Whether Officer 1 used excessive force is not significant in this grievance. What is significant is that Grievant believed Officer 1 used excessive force and was trying to have that issue addressed. With that said, the Hearing Officer will address the issue because it was important to the parties. The Hearing Officer concludes that the Manager's opinion that Officer 1 did not use excessive force is supported by the video and the evidence presented. The University also alleged Grievant disclosed the cell phone video in order to retaliate against Officer 1 who had complained about Grievant. Regardless of whether Grievant's motive was to retaliate against Officer 1, it is clear Grievant believed he had observed the excessive use of force. It was appropriate for him to pursue his concern about an employee using excessive force.

Grievant recommended to the Supervisor that the Department not conduct an investigation and that the Virginia State Police be requested to conduct the investigation. The Supervisor agreed and told Grievant he would forward that recommendation to Manager 2.

The Manager sent an email to Manager 2 stating there was no basis for further investigation.⁶

Grievant met with HR Employee of the Human Resource Department on August 16, 2019. He told her of the allegation of use of excessive force. He did not provide HR Employee with a copy of the recording.

On August 19, 2019, HR Employee contacted Grievant and asked for a copy of the cell phone recording. The HR Vice President had consulted with the University's legal counsel and concluded it was appropriate to HR Employee to request the video from Grievant. Grievant downloaded onto a thumb drive a copy of the video he received by email. On August 20, 2019, Grievant gave HR Employee a thumb drive with a copy of the cell phone recording that Officer 2 had sent to Grievant.

A University manager notified the Manager of the video being given to the Human Resource Department staff. On August 22, 2019, the Manager sought an investigation by the Lieutenant. The Lieutenant investigated the matter.

On September 12, 2019, Grievant received a Written Counseling regarding "the circumstances involving the unauthorized copying of a Mason police body camera video and the subsequent delivery of that video to a person outside of the law enforcement community without authorization." The counseling stated, in part:

This document shall serve as written counseling in regards to your actions and behavior in this matter. By your own admission, you and [Officer 2] colluded in an effort to generate an investigation by either Mason Human Resources or the Virginia State Police that would target [Officer 1] for an alleged episode of excessive force against an arrestee in January 2019. As part of that collusion, you and [Officer 2] produced an unauthorized copy of the body camera video by recording it on a cell phone while employee on his computer in the police office at the Arlington campus. The unauthorized video was then transferred to a thumb drive which you then delivered to [HR Employee]. Human resources is not in law enforcement agency, and the purloined video was/is the property of the Mason Police.

The unauthorized recording of Mason Police body camera video through the use of a cell phone, and/or the delivery of that video to anyone outside of the police department without authorization, is a blatant and serious

⁶ The Hearing Officer does not believe the Manager intended to "cover up" any inappropriate behavior by Officer 1.

violation of GO T003, including VIII(F). If you felt moved to make a complaint to HR regarding an officer's behavior, you could have done so without violating the GOs by trafficking in unauthorized body camera video, but you chose the improper path. That is particularly egregious because you are the official who is in charge of collecting and maintaining the Department's evidence and video archives. I expect a higher level of performance and integrity from a manager in a position of trust.

Because of the profound breach of trust involved in your conduct in this matter, your access to camera video is revoked effective immediately and you are relieved of your duties involving evidence and videos. [Manager 2] will contact you with your new assignment based on the needs of the Mason police.

This written counseling will be maintained by the Professional Standards office for the inclusion in the personnel early warning system (PEWS) database and a copy will be provided to your supervisor for the inclusion and their files for purposes of employee evaluations.⁷

As a result of the written counseling, Grievant was "transferred to a new assignment" by the Manager.⁸

Grievant appealed the written counseling. The Third Step Respondent amended the counseling and wrote, in part:

I have found that you did not adhere to General Order T-003 in your role as the Lieutenant in Charge of Evidence and Property (which includes a management role in maintaining and protecting the body camera video archives.)

The Third Step Respondent upheld the Manager's decision "to revoke your access to camera video and relieve you of your duties involving evidence and video."⁹

Grievant received substituted work duties including becoming the Department's LInX administrator, and updating manuals. Grievant was required to wear a uniform at all times and adhere to a "strict schedule."

The Interim President denied Grievant's request for a hearing because "there has been no adverse action taken against you."¹⁰

⁷ Agency Exhibit 1, p. 1.

⁸ See, Second Step Response.

⁹ See, Third Step Response.

¹⁰ Agency Exhibit p 42.

CONCLUSIONS OF POLICY

The University must rescind its written counseling of Grievant and restore him to the duties and position he held prior to the issuance of the written counseling. This decision follows for several reasons.

First, the University's written counseling is disciplinary action. It reveals an intent to discipline and imposes sanctions in response to alleged misbehavior.¹¹ Disciplinary action is an adverse employment action.¹² Agencies are to impose disciplinary action using a Written Notice. The Hearing Officer will treat the University's written counseling of Grievant as a Written Notice because that is the action the University should have taken. In this case, the University alleges Grievant failed to comply with written policy. Failure to comply with policy is a Group II offense. An employee who commits a Group II offense may be given a Group II Written Notice and suspended for up to ten workdays. A Group II Written Notice, standing alone, does not authorize an agency to transfer an employee or change an employee's duties. An agency may transfer an employee and change the employee's duties for business needs but not as part of the issuance of a Group II Written Notice. Even if the Hearing Officer were to conclude that Grievant failed to follow policy thereby justifying the issuance of a Group II Written Notice, the University's sanctions must be reversed because the sanctions were issued as part of the disciplinary action.

Second, the University alleged Grievant violated Section VIII(F) of Order GO-T003 governing Officer Worn Cameras (OWC). Section III(1)(C) provides:

All recordings shall be considered official department record and subject to all applicable privacy protections, evidentiary and retention requirements.

Section VIII(C) provides:

Supervisors may not routinely review individual officer's OWC to search for officer violations without cause. Review of OWC footage shall be at the Lieutenant or higher ranks.

Section VIII(F) provides:

Officers shall not allow unauthorized persons (to include but not limited to crime victims, families of victims, marketers, or others not working in

¹¹ In the University's Step response, the Manager stated, "[Grievant] was disciplined for violating the General Orders relating to body camera video and releasing stolen video outside of the department without permission." The Manager also wrote, "Based on his actions in this matter, [Grievant] was properly transferred to a new assignment by the [Manager.]"

¹² Even a Group I Written Notice standing alone affects the term of employment because it can form a basis for suspension and removal upon the accumulation of additional disciplinary action.

justice/adjudication system) to view or otherwise access OWC recording or obtain images or audio therefrom. Officer[s] shall not use any recording device, or allow any other party to use any recording device, including but not limited to cell phones to record any imagery or audio from the OWC system. An exception to this prohibition is an official, work-related exigent circumstance, such as a lookout for an active shooter or other violent suspect, during which an image to be distributed to law enforcement via smart phones for law enforcement action is captured. Such transmitted information shall only be shared for legitimate law enforcement purposes and not shared outside the law enforcement community.

Grievant did not violate Section VIII(F). He did not allow an unauthorized person to view or access the OWC of Officer 2.¹³ Grievant transferred the cell phone recording made by Officer 2 to HR Employee. He did not access the OWC of Officer 2 to do so. Even if the two videos were treated the same, HR Employee was not an unauthorized person. Grievant held the position of Lieutenant which enabled him to determine who was an authorized person. HR Employee received the cell phone video after obtaining approval from University legal counsel.

Grievant did not use a recording device or allow Officer 2 to use a recording device to copy the OWC of Officer 2. Officer 2 independently decided to make a copy of the OWC and then notified Grievant that he had a cell phone recording in his possession.¹⁴

Section VIII(F) creates an exception for a work-related exigent circumstance. It then states that "Such transmitted information" cannot be shared outside the law enforcement community. This language means that an image created as a work-related exigent circumstance cannot be shared outside of the law enforcement community. Grievant did not create any images as a work-related exigent circumstance and then share those images outside of the law enforcement community.

Third, Grievant's behavior was protected by Va. Code § 2.2-3000(A). In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her

¹³ Section VIII(F) distinguishes between an OWC recording and a cell phone recording. The first sentence of Section VIII(F), however, only refers to OWC recording. This distinction is significant because it means the first sentence is directed at OWC recordings and not cell phone recordings of OWC recordings. Grievant did not allow anyone to access the OWC recording of Officer 1. In any event, there is no reason to believe Grievant had adequate notice of the Agency's interpretation of Section VIII(F) that effectively blends the OWC recording and a cell phone recording.

¹⁴ The University alleged Grievant "colluded" with Officer 2. There is no reason to believe this is true. Officer 2 made a cell phone recording.

evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to “write her up” (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. 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 that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

Under Virginia Code § 2.2-3000, “[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.” Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act “otherwise protected by law.”

DHRM has broadly interpreted Virginia Code § 2.2-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management. Grievant’s concern was that he had observed another Police Officer engage in what he considered excessive force and the Manager had disregarded that behavior.¹⁵ Grievant was attempting to inform University managers through the Human Resource Department of his concern. His action were protected from discipline by the University.

Grievant argued that the University retaliated against him because he filed prior grievances and engaged in prior protected actions. It is clear that the University’s disciplinary action resulted from its belief that Grievant engaged in behavior (distributing a cell phone recording) that was contrary to policy and justified the issuance of disciplinary action. Grievant’s prior protected activity did not cause the University to take disciplinary action as a form of retaliation.

The University argued that it changed Grievant’s duties for business-related reasons such as not having enough work to perform to justify his prior position duties.

¹⁵ In the example cited by the EDR Director, the employee circumvented the supervisor to complain to the supervisor’s supervisor. Grievant has engaged in similar behavior by attempting to circumvent the Manager’s decision.

While this may be true, it does not excuse the University's method of implementing the change, namely by use of disciplinary action.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Written Counseling with changes in work duties is **rescinded**. The University is **ordered to restore** Grievant to his position duties prior to the issuance of the Written Counseling.

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]

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

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer