COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11559; 11572

Hearing Date: September 28, 2020
Decision Issued: October 12, 2020

PROCEDURAL HISTORY

Grievant was a sergeant for the Department of Corrections ("the Agency"). The two grievances at issue are: 1) a May 15, 2020 expedited grievance challenging the agency's issuance of a Group III Written Notice with a disciplinary demotion and pay reduction for alleged unnecessary use of force and false reporting (Case Number 11559), and 2) a May 14, 2020 grievance challenging the agency's issuance of a Group I Written Notice for alleged unsatisfactory work performance (Case Number 11572). The Grievant voluntarily resigned his employment on May 15, 2020.

The Grievant timely filed a grievance to challenge the Agency's disciplinary actions, and the grievances qualified for a hearing. The Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") found that consolidation of the two grievances was appropriate.

On July 27, 2020, EDR appointed the Hearing Officer for these consolidated grievances. During the pre-hearing conference, the grievance hearing was scheduled for September 28, 2020, on which date the grievance hearing was held, at the Agency's facility.

Both the Agency and Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Grievant
Agency Representative
Counsel for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

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

APPLICABLE LAW AND OPINION

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

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

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

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

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

The Offenses

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

The Agency employed the Grievant as a sergeant, with no prior active Written Notices.

The Group I Written Notice issued April 28, 2020, detailed the offense:

> **Unsatisfactory Performance** – On March 31, 2020, [Grievant] conducted the noon formal institutional count. Upon receiving all counts and entering such into CORIS, [Grievant] cleared the count at 12:22 PM with B and D Dorm counts unreconciled. The count was submitted and an announcement was made across the radio to all units. Once [Grievant] recognized his error, he contacted Sergeant [H]. Sergeant [H] in turn contacted [chief of security] to inform her of the unreconciled count. [Chief of security] instructed the two Sergeants to recount the entire facility and conduct a verification count. After conducting a recount, it was determined that the sallyport officer had submitted an inaccurate count for the offenders on outside grounds.

Agency Exh. 1.

The Group III Written Notice issued May 6, 2020, detailed the offense:

> **Use of Unnecessary Force & False Report** – On December 10, 2019, at approximately 1718 hours, [Grievant] was called to A/B landing by Officer [J] because offender [R] refused to move to C dorm from B dorm. When he arrived to the landing, [Grievant] directed offender [R] to go to gate 3 and discuss the issue. Offender [R] refused. [Grievant] stated to the offender "you will be escorted by me if you do not come by yourself", offender [R] refused again. [Grievant] proceeded to use 2-point contact to escort offender [R]. Offender [R] pulled away from [Grievant]. He then positioned her to the ground for restraint and radioed for Sgt. [S] to bring him handcuffs. This matter referred to SIU Senior Assistant Chief [] on December 12, 2019 for further investigation

> to ascertain unnecessary or excessive force used and concluded April 2020. The investigation revealed that [Grievant] did not have to place his hands on offender [R], as she was not being irate or disruptive. When he placed his hands on her elbow, she grabbed on the desk, which resulted in resistance and resulted in [Grievant] taking her to the ground. [Grievant] failed to utilize any de-escalation techniques and had only interacted with the offender for a matter of seconds before he applied 2-point contact.

As circumstances considered, the Group III Written Notice included:

> The initial report submitted by [Grievant] reflected "On above date and time, I, [Grievant] on A/B Landing because Offender [R] was directed to leave the landing and report to gate 3 and refused. Sgt. [S] and I had to handcuff and escort Offender [R] to the Holding Cell for her to calm down." This report mentioned nothing about force being used. [Grievant] corrected this report after being questioned about his actions. During the due process meeting on 4/20/2020, [Grievant] stated "To be honest, I would not change nothing I did because no one was injured or hurt and that is all I have to say."

The discipline included demotion and 10% pay reduction. Agency Exh. 3.

The chief of security testified consistently with the facts recited in the Group I Written Notice. He emphasized the importance of an accurate count, and that the re-count caused disruption to the institution, lasting more than one hour.

Lieutenant M testified consistently with the facts recited in the Group III Written Notice. He testified that officers are trained to and must employ minimal use of force, there were at least two other offenders on the landing at the time of the incident, and that the incident caused agitation among other offenders.

The SIU Senior Assistant Chief testified consistently with the allegations in the Group III Written Notice. His report is in the record as Agency Exh. 7. He testified to the investigation including the Rapid Eye security video of the entire incident, showing less than 20 seconds from when the Grievant was on the landing and taking the offender to the ground. His conclusion was that the Grievant used unnecessary force. Agency Exh. 8.

The facility superintendent testified that Offender R was a level 1 offender who could work outside the secure perimeter. The facility houses level 1 and level 2 offenders. The superintendent testified that she concluded the Grievant's conduct was unnecessary force. She also testified that she considered the Grievant's incident report to be false because it did not include the offender's takedown to the floor. Agency Exh. 4. The superintendent further testified that the Grievant was a supervisor, and supervisors must model expected behavior. The Grievant has been trained for dialogue and only resorting to force when necessary. She did not impose harsher discipline, including termination, because the Grievant had been an excellent officer, employee, and supervisor. Following the imposition of discipline, the Grievant resigned voluntarily on May 15, 2020.

As for the Group I Written Notice, the superintendent testified that she could have issued a Group II Written Notice for failure to follow policy rather than the lesser Group I for unsatisfactory performance. Regarding the Group III Written Notice, the superintendent testified that she mitigated the discipline from termination to demotion with pay reduction.

Testifying for the Grievant, the nurse confirmed that Offender R was uninjured from the incident. Grievant's witness, AW, refused to testify, but there was no proffer of her testimony to suggest it was material to the issues. The Grievant testified that he explained to Offender R about the move and she refused. He also testified that his first incident report was simply brief and that, when asked, he made his second report with more detail. He did not offer any evidence contrary to that presented by the Agency regarding the offender count for the Group I Written Notice or to contest the accuracy of Agency's evidence and the Rapid Eye security video of the takedown incident of the Group III Written Notice.

The Grievant did not challenge the essential facts of the Written Notices. The Grievant's position, as articulated by his advocate, is that the Agency could have issued an informal counseling for the Group I Written Notice and the Group III Written Notice was similarly excessive, as the force used on the offender did not injure the offender.

Analysis

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g.*, *Rules for Conducting Grievance Hearings,* § VI (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988). As previously stated, the Grievant's burden is to show upon a preponderance of evidence that the agency discriminated against him through misapplication or unfair application of policy.

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *Rules* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
>
> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has reasonably proved the misconduct of the Group I Written Notice. The Grievant did not challenge the essential fact of his error for the offender count. Further, I find that the offense is appropriately considered at least a Group I offense under the Standards of Conduct that provide the Agency with discretion to impose progressive discipline. The Agency, conceivably, and within its discretion, could have imposed lesser discipline, but its election for a Group I Written Notice is supported by the evidence.

As for the Group III Written Notice, the testimony, manner, tone, and demeanor of the testifying witnesses, and the evidence of the Rapid Eye video of the incident, sufficiently prove that the Grievant used unnecessary force to takedown Offender R. Thus, the Agency has proved behavior concerns that the Agency and the supervisor are positioned and obligated to address. Group III offenses include, specifically, "physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders." Operating Procedure 135.1. Accordingly, I find that the Agency has met its burden of showing the Grievant's conduct of unnecessary force as charged in the Group III Written Notice, with one exception. In addition to the unnecessary force, the Written Notice charged the Grievant with making a false report.

A Group III offense includes:

> Falsifying any records either by creating a false record, altering a record to make it false, or omitting key information, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports statements, insurance claims, time records, leave record, or other official state documents.

Operating Procedure 135.1, Standards of Conduct. Agency Exh. 6. Thus, this aspect of the Group III Written Notice could be a stand-alone Group III offense. Falsification is not defined by the Standards of Conduct, but the Hearing Officer interprets this provision to require proof of an intent by the employee to make something false in order for the falsification to rise to the

level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Black's Law Dictionary (6th Edition) as follows:

> Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

> to alter with intent to defraud, to falsify accounts|| to misrepresent, to falsify an issue || to pervert, to falsify the course of justice.

One who asserts actual fraud bears the burden of proving: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994). And "[c]oncealment of a material fact by one who knows that the other party is acting upon the assumption that the fact does not exist constitutes actionable fraud." *Spence v. Griffin*, 236 Va. 21, 28, 372 S.E.2d 595, 598-99 (1988); *see also Van Deusen v. Snead*, 247 Va. 324, 328, 441 S.E.2d 207, 209 (1994). I find, based on the testimony, manner, tone, and demeanor of the testifying witnesses, that the Agency failed to prove the Grievant's intent to make a false report.

Further, I find that the unnecessary force offense, alone, is appropriately considered a Group III offense under the Standards of Conduct that provide the Agency with discretion to impose progressive discipline. When issuing a Written Notice for a Group III offense, discipline shall normally warrant termination. Demotion and pay reduction are alternative, mitigated discipline measures when the issued discipline may result in termination. The disciplinary record before the hearing officer includes the Group I and Group III Written Notices subject to this consolidated grievance. Thus, the disciplinary record supports demotion and pay reduction imposed with the Group III Written Notice.

The Agency has borne its burden of proving the offending behavior, the behavior was misconduct, and Group III is an appropriate level for the unnecessary force offense. I find the circumstances support the Agency's election to issue a Group III Written Notice for unnecessary force. The Agency, conceivably, and within its discretion, could have imposed lesser discipline, however, the Agency issuance of a Group III Written Notice for unnecessary force is well within its discretion.

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

> When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not

> indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges.

While the number of charges remains the same, the policy directive to the hearing officer is clear—to maintain the maximum reasonable discipline for the Group III Written Notice. Thus, demotion, unless the Agency indicates a lesser penalty may be imposed, is supported by the disciplinary record. The Agency has not indicated a lesser penalty, so the question turns to whether the Grievant has shown that the discipline exceeded the limits of reasonableness.

Mitigation

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

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

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum, and the evidence from the Agency is that it imposed less than the maximum discipline of termination. Given the nature of the Written Notices, as decided above, the impact on the Agency, I find no evidence or circumstance that allows the hearing officer to reduce the discipline further than explained above. The Agency has proved (i) the employee engaged in the behavior described in the written notices (as modified), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of demotion must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules* § VI.B.1.

Termination is the normal disciplinary action for a Group III Written Notice unless mitigation weighs in favor of a reduction of discipline. 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.

Under the *Rules*, an employee's length of service and satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. On the issue of mitigation, the Grievant bears the burden of proof, and he lacks proof of sufficient circumstances for the hearing officer to mitigate discipline.

Under the EDR's Hearing Rules, 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, even if he disagrees with the action. In light of the applicable standards, the Hearing Officer finds no basis that provides any authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, the Agency's Group I Written Notice (April 28, 2020) and Group III Written Notice (May 6, 2020) are upheld, with the Group III Written Notice modified to omit and remove the charge of falsifying a report. However, the discipline of demotion and pay reduction are also upheld.

APPEAL RIGHTS

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

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

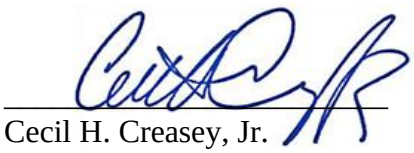
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

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