Issue: Group III Written Notice (damaging State property); Hearing Date: 11/16/12; Decision Issued: 11/30/12; Agency: ABC; AHO: Ternon Galloway Lee, Esq.; Case No. 9916; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 12/15/12; EDR Ruling No. 2013-3501 issued 02/01/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 12/15/12; DHRM Ruling issued 02/08/12; Outcome: AHO's decision affirmed; Judicial Review: Appealed to James City County Circuit Court; Outcome: AHO's decision affirmed (04/15/13) [CL 13-534].**

DECISION OF HEARING OFFICER

In the matter of
Case Number: 9916
Hearing Date: November 16, 2012
Decision Issued: November 30, 2012

SUMMARY OF DECISION

The Agency had found Grievant damaged state property and issued Grievant a Group III Written Notice. Hearing Officer finds that Grievant violated the standards of conduct as alleged and the Agency's discipline is consistent with law and policy. However, the Hearing Officer finds mitigation is appropriated because the Agency unreasonably delayed issuing Grievant his Group III Written Notice. Thus, the Hearing Officer reduces the Grievant's Group III Written Notice to a Group II.

HISTORY

On July 11, 2012, the Agency issued Grievant a Group III Written Notice for damaging state property. On July 12, 2012, Grievant timely filed his grievance to challenge the Agency's action. On September 18, 2012, the office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on September 27, 2012, and subsequently a scheduling order was issued.

The Hearing Officer initially scheduled the hearing for October 30, 2012, a date beyond 35 days after appointment. This was done because the parties lacked availability prior to the October 30, 2012 date. Particularly, Grievant represented unavailability the week of October 1-5, 2012; the Agency's advocate indicated some of the Agency's witnesses were not accessible the following week. Further, the parties noted that mandatory service training for law enforcement officers was scheduled the weeks of October 15, 2012, and October 22, 2012. For this reason, the first mutually available date for the hearing was October 30, 2012. Due to inclement weather, "Super Storm Sandy," and the ensuing closing of state offices on October 30, 2012, the hearing was rescheduled for November 16, 2012.[1]

Prior to commencing the hearing on November 16, 2012, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented. The Hearing Officer also admitted the Agency's Exhibits 1 through 23; Grievant's Exhibits 1 through 29; and Hearing Officer's Exhibits 1 and 2.

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

[1] This was the first date both parties were available for the hearing.

cross examine any witnesses presented by the opposing party.

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

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant (3 witness)[2]

ISSUE

Was the written notice with 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 action against Grievant was 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 is employed in the capacity of a special agent with the Agency. Grievant's responsibilities range from street-level law enforcement duties to sedentary work at a desk reviewing documents. (A Exhs. 4 and. 15, p.11). He has held employment with the Agency for 36 years. (A Exh. 1, p. 1).

2. While Grievant was on duty on June 23, 2011, and operating a state owned vehicle, he was involved in a single car accident. Grievant was traveling about 65 mph when his vehicle drifted off the left side of interstate 64, hit a tree, and overturned. Damage to the vehicle was so extensive that it was deemed a total loss. (A Exh. 1, pp. 4, 6; A Exh. 10; G Exhs. 13 and 14). Grievant has been diagnosed with a seizure disorder since 2003. (A Exh. 15).

3. Due to the accident, the Agency suspended Grievant's police powers and placed him on administrative leave with pay as of July 6, 2011. (G Exh. 18; A and Grievant Exhs., Chronology of Events). Before returning to work, Grievant was required to undergo a medical evaluation as referenced below. (A Exh. 15, p. 86).

[2] Two witnesses for the Agency also testified on behalf of Grievant.

4. The state trooper responding to the accident interviewed witnesses.[3]
They described the incident as Grievant moving at a constant speed on Interstate 64 while slowly drifting left off the side of the road. They observed no brake lights and described the incident as it appearing that Grievant fell asleep. (A Exh. 11, p. 12; A Exh. 6, p. 2). The state trooper did not charge Grievant with an offense and noted there was no improper action by the Grievant. (A Exh. 9, p. 17). But he noted that Grievant had blacked out. The state trooper also concluded that Grievant was negligent due to Grievant acknowledging to Trooper that Grievant had a history of blacking out while operating a motor vehicle, yet Trooper noted he drove on the day of the accident. (A Exh. 2, p. 25; Testimony of Trooper). Trooper's report of the accident revealed that it occurred about 3:15 p.m. on a clear day. The highway was noted as paved. (A Exh. 6).

5. As a result of the circumstances surrounding the accident, On July 11, 2011, Trooper requested the Division of Motor Vehicle ("DMV") obtain a medical examination of Grievant to determine his fitness to drive. (A Exh. 15, p. 1).

6. On July 22, 2011, Grievant's neurologist completed a medical report at DMV's request indicating Grievant had no neurological problems that would keep him from driving. (A Exh. 15, p. 55).

7. As a result of the state trooper's report regarding the accident and under Agency Policy 47, on or about July 14, 2012, the Agency also sought a medical evaluation of Grievant to determine if Grievant was fit for duty as a law enforcement officer. (A Exh. 15, p. 3,6, 11). The medical review was completed on or about December 30, 2011. (A Exh. 15, pp. 78, 85 -87). That report indicated Greivant more than likely suffered a seizure at the time of the accident. The examining physician recommended Grievant not drive for six months. However, the physician did qualify Grievant to perform essential job duties and Grievant returned to work on January 5, 2012. (A Exh. 15, pp. 87-88, 93).

8. On January 6, 2012, Grievant was interviewed as part of a fact finding investigation of the June 23, 2011 accident. The investigation had been requested by Grievant's supervisor on the day of the accident. But Grievant was not interviewed until he returned to work because the investigator believed Agency policy under §9.1-501 of the Code of Virginia required him to wait until Grievant returned to duty to interview Grievant. (Testimony of Investigator; A Exh. 7; A Exh. 8, pp. 1-2)[4]

9. On January 6, 2012 Grievant was provided the notification of pending investigation regarding the June 23, 2011 automobile crash and his administrative proceeding rights. Among other things, Grievant was informed that any admissions made during the course of the investigation could be used to discipline Grievant. The Agency then proceeded to interview Grievant on January 6, 2012. (A Exh. 7, pp. 15-16; G Exhs.

[3] The trooper did not obtain contact information from the witnesses. Thus, their identifications are unknown.
[4] The evidence is insufficient to determine if the Agency was required to wait until Grievant returned to duty before he could be interviewed.

16 and 17; A and Grievant Exhs., Chronology of Events).

10. During the interview, Grievant stated there were no problems with the vehicle and it was a relatively new vehicle. (A Exh. 6, p. 2; A Exh. 7; Testimony of Investigator).). Also, an inspection of the vehicle on August 3, 2012, revealed no mechanical failures with the vehicle. (A Exh. 12; G Exh. 11).

11. The fact finding investigation was concluded in January and the resulting report was produced on January 17, 2012. Regarding the accident, the report concludes by describing the accident and noting that Grievant stated on interview that he did not recall what happened but felt the accident was not a result of his having a seizure. (A Exh. 6, p. 3; G Exh. 4, p.3).

12. By letter dated March 20, 2012, the Agency notified Grievant that he was being placed on monitoring by a physician to ascertain Grievant's compliance with courses of treatment to monitor and control his seizure disorder. (A Exh. 15, p. 93).

13. Practically 12 months after the vehicle accident, the Agency issued Grievant a Memorandum of Pending Disciplinary Action dated June 5, 2012; Grievant filed his response to the memorandum on June 11, 2012; and Grievant was issued a Group III Written Notice for damaging property on July 11, 2012. (A and Grievant's Exh. – Chronology of Events). (A Exh. 5; G Exhs. 2 and 3).

14. Grievant wears glasses mainly for reading. Three days before the accident, Grievant had cataract surgery on his left eye. Thereafter, he had been told by his eye doctor that he did not need to wear glasses. (A Exh. 7, p. 10-11.)

15. Under Agency Policy known as General Order 36 - Vehicle Operation and Assignment, if an investigation of a vehicular accident by an employee agent reveals that the agent acted with a high degree of negligence in causing an accident, the agent may be held responsible for repair of the vehicle. (A Exh. 2, p. 15).

16. Under Agency Policy known as General Order 36 - Vehicle Operation and Assignment, agents such as Grievant are required to operate their state vehicles safely and properly and in full compliance with all traffic laws and regulations. (A Exh. 2, p. 17).

17. Under Agency Policy known as General Order 44 concerning the care of issued equipment, agents may be held responsible for the repair or replacement of equipment issued to them if it is damaged due to their negligence. (A Exh. 2, p. 22).

18. Grievant has had numerous accidents while driving on duty. The dates and incidents appear below:

Date	**Accident/Driving Incident**

1977	Grievant struck from behind
June 16, 1987	Grievant passed out striking mailboxes
November 12, 1987	Deer accident (no fault)
October 18, 1989	Struck from behind while stopped (no-fault)
May 21, 1997	Grievant indicated he dose off while driving, almost striking a vehicle
February 15, 1995	Grievant charged with reckless driving. Grievant advises he was overcome from smoke while inside a licensee
October 14, 2003	accident, cause given was "partial complex seizure disorder"
June 23, 2011	single vehicle accident, drifted off the left lane of Interstate 64

(A Exh. 1, p. 6).

19. Prior to the June 23, 2011 accident, Grievant had received a counseling memorandum for improper driving that could have caused serious consequences. (A Exh. 18, p.1)

20. Under the Agency Policy regarding Vehicle Accident Review, should an investigation reveal that an employee is responsible for an accident, the Agency at its discretion may hold the employee responsible for repairs or subject the employee to disciplinary action. (A Exh. 13, p. 1). The Agency did not hold Grievant responsible for the damage to the vehicle he wrecked on June 23, 2011.

21. A report by the Agency's Accident Committee indicates that Grievant's accident could have been avoided if Grievant had reported any impairment and avoided driving. . (A Exh. 13, p. 9).

22. A disciplinary summary of accidents by state employees from August 3, 2006, to December 20, 2010, shows there had been 26 crashes by employees. Disciplinary action taken on 17 of them was verbal counseling. On 2 of them the operator was not found at fault. On 7 of them discipline was noted as no record or "not enforcement." (A Exh. 14).

23. A medical report from Grievant's neurologist dated August 28, 2012, stated that Grievant's seizures were under control and he was fit for full time work without restrictions. (A Exh. 15, p. 97).

24. Grievant's performance evaluations from 2006 to 2011 have rated him as either an extra or high contributor. (Testimony of Supervisor).

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[5]

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. 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.

On July 11, 2012, management issued Grievant a Group III Written Notice for damaging state property. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

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[5] Grievance Procedural Manual § 5.8

I. Analysis of Issue before the Hearing Officer

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

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The parties agree Grievant wrecked his state operated vehicle on June 23, 2012, resulting in the total loss of it.

Thus, in her deliberations, the Hearing Officer turns to whether this incident constitutes misconduct. The Standards of Conduct provides a non-inclusive list of Group III offenses. One listed is willfully or recklessly damaging state property.

According to *The Webster's Encyclopedic Unabridged Dictionary of the English Language*, (1989 Edition) reckless is defined as "utterly unconcerned about the consequences of some action; without caution; careless."

The evidence shows that the accident occurred on a clear day around 3:15 p.m. on a concrete road. The vehicle was not malfunctioning. The state trooper's report noted that witnesses to the accident described Grievant as driving at a constant speed on Interstate 64 in the left lane, slowly drifting off the road and making such impact with a tree that the car flipped upside down. Although there was consideration given to whether Grievant had a seizure at the time of the accident, Grievant presented evidence from his neurologist that he has been seizure free since 2003.

Considering the facts, the Hearing Officer finds that the wreck could not have happened in the absence of some kind of carelessness. This is so because Grievant has failed to offer any persuasive, alternative explanation where the vehicle under his control was removed from the roadway and crashed with a tree. That said, the Hearing Officer is cognizant of Grievant's argument that the vehicle may have been defective. She is not persuaded by this argument as, when interviewed by the investigator, Grievant stated the vehicle was fairly new and he had experienced no problems with it. Further an inspection of the vehicle by the Agency revealed no defects. Equally as unpersuasive is Grievant's suggestion that his eye surgery three days before the incident may have caused the accident. Again when Grievant was interviewed by the Agency about the accident he commented that he had undergone cataract surgery but his doctor had told him he did not need glasses. He further stated that his glasses are mostly used for reading. Also, Grievant's assertion that the evidence shows he engaged in no misconduct because the Agency did not require him to pay for the damage to the vehicles is unconvincing. Of note, the policy allowing the Agency to seek damages from an employee who has negligently damaged property is discretionary. That policy also permits the Agency to discipline the employee. This is what the Agency decided to do in this case.

As previously noted, I find the wreck could not have occurred but for carelessness and therefore, Grievant as the operator of the vehicle engaged in the conduct alleged in violation of the Standards of Conduct.

B. Was the discipline consistent with policy and law?

Grievant basically contends that other agents or employees have damaged state property or been involved in an accident with a state owned vehicle but were not punished by receiving a Group III Written Notice. The evidence shows Grievant's circumstances are unique as he had numerous incidents where he was involved in accidents. The evidence also shows the Agency has employed progressive discipline because in at least one event he was counseled. In the incident that occurred on June 23, 2011, Grievant's conduct caused the total loss of a state vehicle that, by Grievant's own words, was relatively new and had no problems. Grievant's conduct was caused by carelessness that very likely could have caused a fatality. Group III offenses under the Standards of Conduct normally warrant removal from work. Grievant was issued a Group III Written Notice without suspension or termination. Considering the circumstances and the serious nature of the offense, the Hearing Officer does not find the Agency's discipline was inconsistent with policy.

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"]."[6] 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."[7] 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
the limits of reasonableness.[8]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes

6 Va. Code § 2.2-3005 and (c)(6)

7 *Rules for Conducting Grievance Hearings* VI(A)

8 *Rules for Conducting Grievance Hearings* VI(B)

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.

I have found that Grievant engaged in the behavior noted above, and the Agency's discipline was consistent with law and policy. Next, a focus on whether the discipline was reasonable is undertaken.

Grievant contends the offense occurred a year before he was put on notice that the Agency was contemplating taking disciplinary action against him. The Agency contends Grievant was on leave for six months after the incident and by policy they were precluded from interviewing him during this period. The Agency cites § 9.1-501 of the Code of Virginia as authority for its position. A review of this statute indicates a preference (but not a mandate) for interviewing the officer under investigation while he/she is on duty. That said, the evidence does show Grievant was interviewed January 6, 2012, and the Agency issued its resulting report about two weeks later. But Grievant was not informed of the Agency's intent to discipline him until June 5, 2012. His group notice was not issued until July 11, 2012.

The Standards of Conduct require an Agency to administer discipline in a prompt and fair process. *See* SOP, p. 1. Even assuming the Agency was required to wait until Grievant returned to work to interview him about the accident, the evidence establishes that after Grievant's returned to duty and the Agency completed its investigation, six months passed before Grievant was issued a group notice. The Agency offers no satisfactory explanation for this lengthy delay. In consideration of mitigation, the Hearing Officer is cognizant that the Agency considered Grievant's long service to the Agency and ongoing medical monitoring in determining his punishment. But the Hearing Officer finds that the 6 month delay (not to mention 13 month delay from the date of the accident) unfairly burdened Grievant with developing his case to oppose any disciplinary action. Accordingly, for this reason, the Hearing Officer finds the Agency's discipline notice should be reduced. *See, e.g.,* Hearing Officer Decision, EDR Case Number 801, issued August 26, 2004.

DECISION

The Hearing Officer has considered all the evidence of record[9] whether specifically mentioned or not. Having done so, for the reasons noted here, the Hearing Officer finds that Grievant violated the standards of conduct by damaging state property and the Agency's discipline was consistent with law and policy. However, mitigation is appropriate because the Agency unreasonably delayed issuing Grievant the group notice. Thus, the Hearing Officer reduces the Group III Written Notice to a Group II and orders the Agency to take the necessary measures to comply with this order.

APPEAL RIGHTS

[9] This includes but is not limited to Grievant's claims that the Agency failed to timely notify him of the investigation.

You may file an **administrative review** requests 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 30th day of November, 2012.

____

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT
In the Matter of the
Department of Alcoholic Beverage Control
February 8, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9916. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer gave a summary of this decision as follows:

> The Agency had found Grievant damaged state property and issued Grievant a Group III Written Notice. Hearing Officer finds that Grievant violated the standards of conduct as alleged and the Agency's discipline is consistent with law and policy. However, the Hearing Officer finds mitigation is appropriate because the Agency unreasonably delayed issuing Grievant his Group III Written Notice. Thus, the Hearing Officer reduces the Grievant's Group III Written Notice to a Group II.
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> ************
>
> On July 11, 2012, the Agency issued Grievant a Group III Written Notice for damaging state property. On July 12, 2012, Grievant timely filed his grievance to challenge the Agency's action. On September 18, 2012, the office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal.
>
> ************

The relevant facts of this case are as follows:

1. Grievant is employed in the capacity of a special agent with the Agency. Grievant's responsibilities range from street-level law enforcement duties to sedentary work at a desk reviewing documents. He has held employment with the Agency for 36 years.

2. While Grievant was on duty on June 23, 2011, and operating a state owned vehicle, he was involved in a single car accident. Grievant was traveling about

65 mph when his vehicle drifted off the left side of interstate 64, hit a tree, and overturned. Damage to the vehicle was so extensive that it was deemed a total loss. Grievant has been diagnosed with a seizure disorder since 2003.

3. Due to the accident, the Agency suspended Grievant's police powers and placed him on administrative leave with pay as of July 6, 2011. Before returning to work, Grievant was required to undergo a medical evaluation as referenced below.

4. The state trooper responding to the accident interviewed witnesses. They described the incident as Grievant moving at a constant speed on Interstate 64 while slowly drifting left off the side of the road. They observed no brake lights and described the incident as appearing that Grievant fell asleep. The state trooper did not charge Grievant with an offense and noted there was no improper action by the Grievant. But he noted that Grievant had blacked out. The state trooper also concluded that Grievant was negligent due to Grievant acknowledging to Trooper that Grievant had a history of blacking out while operating a motor vehicle, yet Trooper noted he drove on the day of the accident. Trooper's report of the accident revealed that it occurred about 3:15 p.m. on a clear day. The highway was noted as paved.

5. As a result of the circumstances surrounding the accident, on July 11, 2011, Trooper requested the Division of Motor Vehicles ("DMV") obtain a medical examination of Grievant to determine his fitness to drive.

6. On July 22, 2011, Grievant's neurologist completed a medical report at DMV's request indicating Grievant had no neurological problems that would keep him from driving.

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8. On January 6, 2012, Grievant was interviewed as part of a fact-finding investigation of the June 23, 2011 accident. The investigation had been requested by Grievant's supervisor on the day of the accident. But Grievant was not interviewed until he returned to work because the investigator believed Agency policy under §9.1-501 of the Code of Virginia required him to wait until Grievant returned to duty to interview Grievant.

9. On January 6, 2012, Grievant was provided the notification of pending investigation regarding the June 23, 2011 automobile crash and his administrative proceeding rights. Among other things, Grievant was informed that any admissions made during the course of the investigation could be used to discipline Grievant. The Agency then proceeded to interview Grievant on January 6, 2012.

10. During the interview, Grievant stated there were no problems with the vehicle and it was a relatively new vehicle. Also, an inspection of the vehicle on August 3, 2012, revealed no mechanical failures with the vehicle.

11. The fact-finding investigation was concluded in January and the resulting report was produced on January 17, 2012. Regarding the accident, the report concludes by describing the accident and noting that Grievant stated during the interview that he did not recall what happened but felt the accident was not a result of his having a seizure.

12. By letter dated March 20, 2012, the Agency notified Grievant that he was being placed on monitoring by a physician to ascertain Grievant's compliance with courses of treatment to monitor and control his seizure disorder.

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19. Prior to the June 23, 2011 accident, Grievant had received a counseling memorandum for improper driving that could have caused serious consequences.

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21. A report by the Agency's Accident Committee indicates that Grievant's accident could have been avoided if Grievant had reported any impairment and avoided driving.

22. A disciplinary summary of accidents by state employees from August 3, 2006, to December 20, 2010, shows there had been 26 crashes by employees. Disciplinary action taken on 17 of them was verbal counseling. On two of them the operator was not found at fault. On seven of them discipline was noted as no record or "not enforcement."

23. A medical report from Grievant's neurologist dated August 28, 2012, stated that Grievant's seizures were under control and he was fit for full time work without restrictions.

24. Grievant's performance evaluations from 2006 to 2011 have rated him as either an extra or high contributor. (Testimony of Supervisor).

DETERMINATIONS AND OPINION

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I. Analysis of Issue before the Hearing Officer

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A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

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Thus, in her deliberations, the Hearing Officer turns to whether this incident constitutes misconduct. The Standards of Conduct provides a non-inclusive list of Group III offenses. One listed is willfully or recklessly damaging state property.

According to *The Webster's Encyclopedic Unabridged Dictionary of the English Language,* (1989 Edition) reckless is defined as "utterly unconcerned about the consequences of some action; without caution; careless."

The evidence shows that the accident occurred on a clear day around 3:15 p.m. on a concrete road. The vehicle was not malfunctioning. The state trooper's report noted that witnesses to the accident described Grievant as driving at a constant speed on Interstate 64 in the left lane, slowly drifting off the road and making such impact with a tree that the car flipped upside down. Although there was consideration given to whether Grievant had a seizure at the time of the accident, Grievant presented evidence from his neurologist that

he has been seizure free since 2003.

Considering the facts, the Hearing Officer finds that the wreck could not have happened in the absence of some kind of carelessness. This is so because Grievant has failed to offer any persuasive, alternative explanation where the vehicle under his control was removed from the roadway and crashed with a tree. That said, the Hearing Officer is cognizant of Grievant's argument that the vehicle may have been defective. She is not persuaded by this argument as, when interviewed by the investigator, Grievant stated the vehicle was fairly new and he had experienced no problems with it. Further, an inspection of the vehicle by the Agency revealed no defects. Equally as unpersuasive is Grievant's suggestion that his eye surgery three days before the incident may have caused the accident. Again, when Grievant was interviewed by the Agency about the accident he commented that he had undergone cataract surgery but his doctor had told him he did not need glasses. He further stated that his glasses mostly are used for reading. Also, Grievant's assertion that the evidence shows he engaged in no misconduct because the Agency did not require him to pay for the damage to the vehicles is unconvincing. Of note, the policy allowing the Agency to seek damages from an employee who has negligently damaged property is discretionary. That policy also permits the Agency to discipline the employee. This is what the Agency decided to do in this case. As previously noted, I find the wreck could not have occurred but for carelessness and therefore, Grievant as the operator of the vehicle engaged in the conduct alleged in violation of the Standards of Conduct.

B. Was **the discipline consistent with policy and law?**

Grievant basically contends that other agents or employees have damaged state property or been involved in an accident with a state owned vehicle but were not punished by receiving a Group III Written Notice. The evidence shows Grievant's circumstances are unique as he had numerous incidents where he was involved in accidents. The evidence also shows the Agency has employed progressive discipline because in at least one event he was counseled. In the incident that occurred on June 23, 2011, Grievant's conduct caused the total loss of a state vehicle that, by Grievant's own words, was relatively new and had no problems. Grievant's conduct was caused by carelessness that very likely could have caused a fatality. Group III offenses under the Standards of Conduct normally warrant removal from work. Grievant was issued a Group III Written Notice without suspension or termination. Considering the circumstances and the serious nature of the offense, the Hearing Officer does not find the Agency's discipline was inconsistent with policy.

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”]. 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.” 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 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.

I have found that Grievant engaged in the behavior noted above, and the Agency’s discipline was consistent with law and policy. Next, a focus on whether the discipline was reasonable as undertaken.

Grievant contends the offense occurred a year before he was put on notice that the Agency was contemplating taking disciplinary action against him. The Agency contends Grievant was on leave for six months after the incident and by policy, they were precluded from interviewing him during this period. The Agency cites § 9.1-501 of the Code of Virginia as authority for its position. A review of this statute indicates a preference (but not a mandate) for interviewing the officer under investigation while he/she is on duty. That said, the evidence does show Grievant was interviewed January 6, 2012, and the Agency issued its resulting report about two weeks later. But Grievant was not informed of the Agency’s intent to discipline him until June 5, 2012. His group notice was not issued until July 11, 2012.

The Standards of Conduct require an Agency to administer discipline in a prompt and fair process. *See* SOP, p. 1. Even assuming the Agency was required to wait until Grievant returned to work to interview him about the accident, the evidence establishes that after Grievant’s returned to duty and the Agency completed its investigation, six months passed before Grievant was issued a group notice. The Agency offers no satisfactory explanation for this lengthy delay. In consideration of mitigation, the Hearing Officer is cognizant that the Agency considered Grievant’s long service to the Agency

> and ongoing medical monitoring in determining his punishment. But, the Hearing Officer finds that the 6 month delay (not to mention a 13-month delay from the date of the accident) unfairly burdened Grievant with developing his case to oppose any disciplinary action. Accordingly, for this reason, the Hearing Officer finds the Agency's discipline notice should be reduced. *See, e.g.,* Hearing Officer Decision, EDR Case Number 801, issued August 26, 2004.

DECISION

> The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Hearing Officer finds that Grievant violated the standards of conduct by damaging state property and the Agency's discipline was consistent with law and policy. However, mitigation is appropriate because the Agency unreasonably delayed issuing Grievant the group notice. Thus, the Hearing Officer reduces the Group III Written Notice to a Group II and orders the Agency to take the necessary measures to comply with this order.

DISCUSSION

hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted.

In his appeal to the DHRM, the grievant raised the following issues:

1. The DABC did not meet the burden of proof in establishing that the disciplinary action was warranted and appropriate under the *Grievance Procedure Manual 5.8 (2)*.
2. The Agency had not been consistent in its application of disciplinary action for similar violations.
3. The Agency did not take disciplinary action in a timely manner.

Concerning item number one, our review of that issue shows that the hearing officer based her conclusion on the evidence. The authority of this Agency is limited to reviewing policy issues, not evidentiary issues.

Concerning item number two, it is clear from the decision that the hearing officer considered the infractions by other employees and the resulting disciplinary actions. However, the circumstances surrounding each accident vary and this Agency has no authority to evaluate that evidence.

Concerning item number three, it is clear that the hearing officer factored into her decision to mitigate the disciplinary action the agency's delay in taking immediate action.

Summarily, there is nothing in the grievant's request for review that indicates that this is a policy issue. Rather, it appears that the grievant is contesting the evidence the hearing officer considered, how she assessed that evidence, and the resulting decision. Thus, we will not interfere with the application with this decision.

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE CITY OF WILLIAMSBURG AND THE COUNTY OF JAMES CITY

Grievant/Appellant,

v. **CL 13-534**

VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Agency/Appellee.

FINAL ORDER

The Court, having reviewed the record and having considered the arguments of the parties in this appeal under the Grievance Procedure for state employees, Va. Code § 2.2-3000 *et seq.*, has determined that the decision of the hearing officer is not "contradictory to law" within the meaning of Va. Code § 2.2-3006(B), the statutory standard for judicial review of such appeals. Accordingly, the Court AFFIRMS the hearing officer's decision and dismisses this appeal with prejudice.

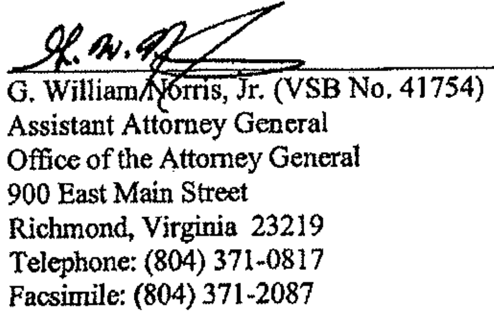
and was present at the hearing

Because the Appellant is not represented by counsel in this matter, the Court waives endorsement as permitted by Rule 1:13 of the Rules of the Supreme Court of Virginia, and notes Appellant's objections to this ruling. The Clerk is directed to provide copies of this order to Appellant and counsel for Appellee.

Entered this 15th day of April, 2013.

Judge

We ask for this:



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Counsel for Appellee Virginia Department of Alcoholic Beverage Control

I CERTIFY THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY, VA AND I AM CUSTODIAN OF THAT RECORD.
BETSY B. WOOLRIDGE, CLERK
BY: D.C.