



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11630

Hearing Date: March 8, 2021
Decision Issued: May 24, 2021

PROCEDURAL HISTORY

On October 27, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy. On October 27, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for knowingly making a false official statement on or about February 7, 2020. On October 27, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for making a false official statement on March 14, 2020.

On November 10, 2020, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On November 30, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 8, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
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

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

The Virginia Department of State Police employed Grievant as a Law Enforcement Officer III at one of its locations. He received an overall rating of "Extraordinary Contributor" for his 2017 and 2018 annual performance evaluations. No evidence of prior active disciplinary action was introduced during the hearing.

The purpose of Grievant's position included, "[providing] thorough, comprehensive, objective investigations involving insurance fraud, and provide assistance to the insurance industry, local, state, and federal enforcement agencies in all matters of mutual interest." He was expected to make sure that "data and reports are accurate and reliable."¹ Grievant received training regarding investigating vehicle crashes and had conducted vehicle crash investigations. He received training regarding insurance fraud and insurance fraud investigations.

¹ Agency Exhibit p. 35.

The Agency assigned Grievant a 2017 Ford F-150 XL Supercab pickup truck to operate while performing his job duties. In February 2019, the vehicle had been driven approximately 8,000 miles.

On Monday February 4, 2019, Grievant drove his Agency issued State Police Vehicle to a local Fire Department where Grievant was a member. At approximately 9 or 10 p.m., after speaking with several Firefighters, Grievant got into his State Police Vehicle and began backing up. He backed the State Police Vehicle into a vehicle owned by Mr. W. The bumper of the State Police Vehicle hit the driver's side door of Mr. W's vehicle. Mr. W was unable to roll down the window in the door that was hit.

Grievant and Mr. W agreed they would resolve the damages between themselves without contacting insurance companies or reporting the matter. Mr. W did not tell Grievant that Mr. W thought the damage could be "popped out" and repaired for \$50 or \$100 as later claimed by Grievant. At the time he spoke with Grievant, Mr. W had no idea how much it would cost to repair his vehicle.

Grievant knew he was obligated to report the accident immediately to a supervisor. He did not report the accident because he feared the Agency would punish him for using his State Police Vehicle to perform personal business.

On Tuesday February 5, 2019, Grievant was on approved leave and did not report to work.

On Wednesday February 6, 2019, Grievant went to the Division Headquarters. Grievant spoke with Lieutenant P and said he noticed damage to the State Police Vehicle when he was removing a rifle from the bed of the truck. Grievant said he had no information about when or how the damage occurred. Lieutenant P told Grievant to obtain three cost estimates for repair of the vehicle.

On February 6, 2019, Grievant received two quotes for repairs to the State Police Vehicle. Company One provided a quote to repair the vehicle for \$1,222.30. This cost was for \$85 in parts and 21.2 hours of labor. Company Two provided a quote to repair the vehicle for \$1,546.23.

General Order 4.01 states, "The FR-300P is required for all Department vehicle crashes." Grievant asked Trooper J to investigate the damage to his State Police Vehicle.

On February 8, 2019, Trooper J went to Grievant's house to complete an SP155 form. Grievant provided Trooper J with information about the damaged State Police Vehicle. Trooper J wrote in the SP155 that the date and location of the occurrence were unknown. He checked a box indicating Grievant was not on duty at the time of the incident. Trooper J wrote Grievant's statement, "I noticed damage as I was removing

equipment from the rear of the truck.”² Trooper J wrote the description of the damage as, “Rear Drivers side bumper, Rear Drivers side lamp, [Scratch] on Tonneau Cover.”³

Trooper J took pictures of the damage and spoke with Grievant about how the damage occurred. After completing the SP155 form, Trooper J emailed it to Grievant and Lieutenant P.

On February 8, 2019, Grievant received a third quote for the damage to the State Police Vehicle.

On February 22, 2019, Grievant paid Mr. W \$1,950 to compensate Mr. W for the damage done to Mr. W’s vehicle.

On March 12, 2019, Grievant picked up the repaired State Vehicle from the body shop. He paid \$1,223.30 for the repair using a State-issued credit card.

Grievant became concerned that the Agency would learn of the damage to his State Police Vehicle from another Agency employee so he decided to notify Agency managers of the accident at the local Fire Department.

On March 14, 2019, Grievant called Lieutenant P and said that the vehicle damage he reported a few weeks earlier was the result of an unknown incident and he had no idea when, where, or how it happened. Grievant said that a few days prior to reporting that damage to Lieutenant P, he had stopped at the fire hall and backed into another vehicle. Grievant said the damage to his vehicle was no more than a scuff and that he was able to buff it out. Grievant said that the damage to the other vehicle was also minimal and he took care of the damage personally. Grievant said that the damage to his vehicle was the result of two separate incidents, one at the fire hall with very minimal damage that he was able to buff out and another unknown incident that occurred a few days after the fire hall damage. Lieutenant P asked Grievant why he did not report the first incident to a supervisor. Grievant said he was concerned because he was on his way home from work and had stopped at the fire hall for a meeting. Grievant said he did not want supervision to think he was using his vehicle in an unauthorized capacity and that the damage was so minor that he did not think it was a big deal. Lieutenant P told Grievant to notify First Sergeant S.

Grievant called First Sergeant S and told First Sergeant S that a few weeks ago Grievant’s vehicle was hit in the Division parking lot. Grievant said that just a few days prior to that happening there was a completely separate incident that happened that he did not report to supervision because he had taken care of it. Grievant said he had stopped at a fire department meeting on his way home from work. As he was backing up in the parking lot, he hit another vehicle causing very minimal damage to both vehicles.

² Agency Exhibit p. 135.

³ Agency Exhibit p. 134.

Grievant said, he “has a friend that took care of fixing the other vehicle.” Grievant said that his department vehicle had just a scuff mark and that he was able to just buff it out. Grievant said it was bad luck that his vehicle was then hit in the same place at the Division a few days later.

The Agency began an investigation. It referred the matter to a Commonwealth’s Attorney for criminal prosecution. The charges against Grievant were dismissed when the matter was before the Circuit Court because the Agency failed to properly disclose evidence it had against Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁴ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group II Written Notice

General order 4.01 governs State-owned and State-leased Vehicle Crash Investigation. Section 2(a) provides:

Immediately following a crash involving Department-owned or leased motor vehicle, unless less physically incapacitated, the employee will make his/her supervisor aware of the fact, using his/her best judgment, as to communication depending upon the extent of the injury or damage to equipment.

Grievant crashed his State Police Vehicle on February 4, 2019. He did not report the crash to a supervisor until March 14, 2019. He failed to immediately report the crash as required by General Order 4.01 thereby justifying the Agency’s issuance of a Group II Written Notice for failure to follow policy.

Grievant admitted he failed to comply with policy.

Group III Written Notice – February 6, 2019 Statements

General Order ADM 11.00 sets forth Standards of Conduct and provides:

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of Department business and the maintenance of confidence by citizens of the Commonwealth.

Section 38 provides:

Employees shall be honest and truthful and shall not lie, make any intentionally deceptive statements, misrepresentations and/or omissions during any job-related function ... and/or administrative investigation involving themselves or other employees. Employees shall not tamper with, alter and/or intentionally withhold evidence or facts which have evidentiary value. ***

Employees who engage in intentional deception shall be subject to the Standards of Conduct up to, and including, termination.

General Order 12.02 governs Disciplinary Measures. Section 11 provides:

Dishonesty and integrity

Honesty and integrity are the foundation upon which the Department was built and they are reflected in our core values. Complaints involving a Department employee's honesty and integrity will be thoroughly investigated.

Group III offenses include, "knowingly making any false official statement."⁵ On February 6, 2019, Grievant told Lieutenant P that he had no information about when or how the damage occurred. On February 8, 2019, Grievant told Trooper J, "I do not know when or how the damage occurred." Grievant knew that Trooper J would include his statement in an SP155 report. Grievant's statements were official statements. He knew that the damage to his State Police Vehicle occurred on February 4, 2019 at the local Fire Department when he backed the State Police Vehicle into Mr. W's vehicle. Grievant knew his statements to Lieutenant P and to Trooper J were false. Grievant knowingly made false official statements. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Group III Written Notice – March 14, 2019 Statements

Group III offenses include, "knowingly making any false official statement."⁶ On March 14, 2019, Grievant told Lieutenant P that he backed the State Police Vehicle into

⁵ See, General Order 12.02.

⁶ See, General Order 12.02.

another vehicle at the local Fire Department but did not report the resulting damage to his vehicle because it was minimal and he repaired the damage himself. Grievant told Lieutenant P the damage to his vehicle was no more than a scuff and that he was able to buff it out. Grievant told First Sergeant S that his Department vehicle had just a scuff mark and that he was able to just buff it out.

At the time the State Police Vehicle was taken to be repaired, the damage arising at the local Fire Department was visible and included scuff marks. Grievant had not repaired the damage himself or buffed out the scratch marks. The damage was repaired at a cost of \$1,223.23. Grievant knew that the description of the damage he gave to Lieutenant P and First Sergeant S on March 14, 2019 was false. Grievant's statements were official statements. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Claim of Two Incidents

Grievant argued that there were two accidents resulting in damage to the State Police Vehicle. The first incident occurred on February 4, 2019 at the local Fire Department. The second incident occurred after the night of February 4, 2019 and before the morning of February 6, 2019 when he reported the damage. Grievant testified he parked the State Police Vehicle on the street in his neighborhood and it likely was hit by another vehicle while parked in the street. Grievant argued that the damage from the second incident was "distinctly different" from the damage caused in the first incident. Grievant argued that his statements were not false and were explained by the fact that there were two accidents. With this analysis, Grievant asserts that the Agency cannot establish that he made any false statements and the two Group III Written Notices should be reversed.

The Hearing Officer does not believe there were two accidents resulting in damage to the State Police Vehicle for two reasons. First, although possible, it is unlikely that the same vehicle would be involved in two accidents within a few days. Second, although possible, it is unlikely that one vehicle involved in two accidents over a few days would be damaged in the same place on the vehicle.⁷

Even if the Hearing Officer were to assume that two accidents occurred, there remains sufficient evidence to support the issuance of disciplinary action. The Agency's standards for truthfulness were "unusually high" and included avoiding "intentional deception." If two accidents had occurred, Grievant deceived Lieutenant P and Trooper J by failing to disclose the first accident on February 6, 2019. The first accident would

⁷ Mr. W believed that the damage on the State Police Vehicle that he observed on February 4, 2019 was the same damage appearing in the pictures taken prior to repairs being made. The pictures were taken after the alleged second accident. If the damage from the two accidents was "distinctly different" as claimed by Grievant, Mr. W would have recognized the difference.

have been material information that Agency managers would have needed to know in order to properly investigate the damage to the State Police Vehicle.

Even if there had been a second accident, Grievant knew where the second accident occurred. It would have occurred outside of his house. Once Grievant parked the vehicle outside of his house on the evening of February 4, 2019, he did not perform work duties until February 6, 2019 when he went to the Division office. He would not have been authorized to use the vehicle while he was not working. Thus, the vehicle would have remained parked outside of Grievant's house when it was hit by another vehicle as Grievant claimed. On February 6, 2019, Grievant told Lieutenant P and Trooper J he did not know where the incident occurred, but in fact he knew the only place the second accident could have occurred was outside of his house.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁸ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. 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.

Grievant presented evidence suggesting that the Agency unnecessarily pursued criminal charges against him and created documents it failed to disclose which ultimately resulted in the charges against him being dismissed. Although Grievant's evidence was significant, it would not constitute a mitigating factor under the Rules for Conducting Grievance Hearings. Grievant's remedy, if any, would be outside of the grievance hearing process. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice for making false official statements on February 6, 2019 is

⁸ Va. Code § 2.2-3005.

upheld. The Agency's issuance to the Grievant of a Group III Written Notice for making false official statements on March 14, 2019 is **upheld.** Grievant's removal is **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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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